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BILL ANOATUBBY
GOVERNOR

March 30, 2012

Ms. Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, DC 20005

Dear Chairwoman Stevens:

The Chickasaw Nation is pleased to submit written comments on Proposed Subchapter H, 25 C.F.R. Parts 580-85: Appeal Proceedings before the Commission, which was published in the Federal Register on January 31, 2012. 77 Fed. Reg. 4720. The opportunity to participate in this important consultation process is greatly appreciated.

We find the current draft to be a significant improvement over the Preliminary Draft. However, we believe that additional work is necessary before these rules are ready for promulgation. In the enclosed comments, the Chickasaw Nation offers recommendations for resolving the remaining issues in the proposed rule so that rules governing appeal proceedings before the National Indian Gaming Commission are consistent with the Indian Gaming Regulatory Act ("IGRA"), principles of tribal sovereignty, and the special government-to-government relationship between the United States and American Indian tribal governments.

Thank you for your consideration of the Chickasaw Nation's comments on this important matter. We look forward to continuing to work closely with the NIGC in the spirit of the government-to-government relationship and in accordance with federal law and policy.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation

Enclosure

COMMENTS OF THE CHICKASAW NATION ON THE NATIONAL INDIAN GAMING COMMISSION'S PROPOSED SUBCHAPTER H, 25 C.F.R. PARTS 580 – 85, APPEAL PROCEEDINGS BEFORE THE COMMISSION

The Chickasaw Nation offers the following comments in response to the National Indian Gaming Commission's (NIGC) Notice of Proposed Rulemaking of Subchapter H 25 C.F.R. Parts 580 – 85, which was published in the Federal Register on January 31, 2012. 77 Fed. Reg. 4720. The Chickasaw Nation appreciates the opportunity to participate in this consultation process and is encouraged by the NIGC's efforts to incorporate and address the concerns and comments raised by tribal governments in response to the preliminary discussion draft of this regulation. We hope the comments below are both helpful and useful to the NIGC in identifying remaining issues in the proposed rule and considering additional revisions that will bring the regulation closer to the purposes and goals of the Indian Gaming Regulatory Act (IGRA).

Proposed Parts 580-585 appear to reflect the Commission's desire for a heightened level of formality and finality in appeal proceedings between the Commission and appellant tribes. We are afraid, however, that this general shift towards formalization of the NIGC's appeals process may burden the special government-to-government relationship between the NIGC and tribes. While we support the NIGC's efforts to develop a more efficient and streamlined process for hearing and deciding matters on appeal, we are concerned that the appeal procedures outlined in the proposed rule focus too much on speedy and uncompromising punitive actions and not enough on deliberative and collaborative measures.

The IGRA was enacted to preserve the tribe's ability to develop Indian gaming as an important economic resource, and many tribes rely heavily on their gaming operations to fund important government services for their members. Interference with a tribal government's gaming operation, therefore, impacts an entire sovereign nation and should be approached with the due regard, respect, and deference for the sovereign powers, rights, and authority of the tribal government. It is a world apart from, for example, fining or ordering the temporary closure of a small business. Thus, in developing procedures for hearing and deciding appeals, it is important to keep in mind how the NIGC differs from other civil regulatory agencies, which are typically tasked with regulatory oversight over the activities of individuals or entities, not sovereign tribal governments. While a rigid appeals process that favors efficiency over collaboration may be appropriate for such other agencies, we strongly believe that the NIGC's unique government-to-government relationship with tribal governments warrants a more informal and collaborative appeals process that respects the role of tribal governments as primary regulators of their gaming activities.

The procedures set forth in the proposed rule, however, lock the Commission into a rigid, adversarial appeals process and thus limit the Commission's ability to consider more informal procedures such as discussions, negotiations, and meetings. In our view, the process for appeal proceedings before the Commission should be drafted in a manner

that encourages parties to reach an amicable resolution of a regulatory issue that is properly brought under the Commission's authority to hear appeals under IGRA.

Notwithstanding these overarching concerns, we appreciate the restructuring of the proposed parts and agrees that the current draft is an organizational improvement over the discussion draft.

25 C.F.R. Part 580 –
Rules of General Application in Appeal Proceedings Before the Commission

Ex Parte Communications

The Chickasaw Nation appreciates the NIGC's proposal to exclude ex parte provisions from this regulation. When a tribal government is a party to a proceeding before the Commission, an ex parte communication policy should not serve as a barrier to the special government-to-government relationship between that tribal government and the NIGC. Ex parte rules should be designed to prevent any advantage one party might gain by engaging in communication with the decision-maker without the adverse party being given the opportunity to be present or make its own arguments. This view is consistent with the definition of ex parte communications in Black's Law Dictionary, which reads as follows:

A generally prohibited communication between counsel and the court when opposing counsel is not present.

In clarifying rules against ex parte communications for purposes of the NIGC's regulations, the scope of prohibited ex parte communications should be limited to communications with the presiding staff and his or her immediate staff when an adverse party is not present. In other words, a prohibition on ex parte communications should only apply when the proceeding involves at least two parties in a dispute before a neutral arbiter. The lines of communication between tribal governments and the NIGC, however, should always remain open throughout the appeals process so that there is ample opportunity for the parties to engage in discussions, negotiations, and informal meetings.

Should a prohibited ex parte communication occur, the NIGC should incorporate the provisions in the Discussion Draft which allow for the preservation of the communication in the record and service on adverse parties. In addition, the NIGC should consider including provisions that allow for the adverse party to respond to the communication on the record.

Definition of "Presiding Official" (25 C.F.R. § 580.1)

The preamble notes that several commenters requested a regulatory definition of "presiding official." It is unfortunate that the resultant definition in proposed § 580.1 states only that a presiding official is "[t]he individual who presides over the hearing and

issues the recommended decision under part 584." Defining a presiding official as the one "who presides" completely misses the opportunity to define presiding official in a way that ensures that the person selected as a presiding official is qualified to conduct an impartial hearing. Consider the International Trade Administration's definition of presiding official:

Presiding official means the person authorized to conduct hearings in administrative proceedings or to rule on any motion or make any determination under this part, who may be an Administrative Law Judge, a Hearing Commissioner, or such other person who is not under the supervision or control of the Assistant Secretary for Import Administration, the Deputy Under Secretary for International Trade, the Chief Counsel for Import Administration, or a member of the APO Sanctions Board.[1]

The Chickasaw Nation requests that the NIGC include a more robust definition of presiding official that would assure a potential appellant that a person "under the supervision or control" of the Commission could not qualify as a presiding official.

Suspension, Revocation, Amendment, or Waiver of Rules (25 C.F.R. § 580.2)

Proposed § 580.2 contains two standards in relation to the Commission's ability to suspend, revoke, amend, or waive its rules: (1) good cause; and (2) interest of justice. We find such standards to be unnecessarily high and restrictive in light of the special government-to-government relationship between the NIGC and tribal governments, which we believe warrants a more informal and collaborative appeals process that respects the role of tribal governments as primary regulators of their gaming activities.

Tribal governments should not be required to show "good cause" if a waiver or amendment of the rules is necessary; instead, the possibility of waiving or amending the rule should always remain open as a viable option for every matter on appeal. As noted above, the appeals process should be designed so that the parties can reach an amicable resolution of the regulatory issue on appeal, even if it requires a departure from the rules and procedures set forth in this Subchapter. We are concerned that the "good cause" language in this section may restrict the NIGC's ability to use alternative or informal measures in resolving the matter on appeal.

The "interest of justice" standard is similarly problematic as it limits the types of matters that may be entitled to a waiver or amendment by the NIGC. Rather than granting waivers and other exceptions "if the interest of justice so requires," the primary consideration should be whether such exceptions should be granted on *equitable* grounds. This is especially important in the context of enforcement matters where an enforcement action can have a punitive effect on the tribal government and its gaming operation. As a civil regulatory agency, the NIGC's regulatory purpose is to effect compliance, not punish. The regulations should thus encourage the NIGC to consider exceptions if necessary to promote compliance and mitigate punitive measures. We therefore ask the

[1] 19 C.F.R. 354.2.

NIGC to remove the "interest of justice" standard and include language that will allow the NIGC to make an exception based on equitable considerations.

Recommended Decisions as Final Agency Actions (25 C.F.R. § 580.10)

We are deeply concerned by the NIGC's proposal to designate the Chair's decision as a final agency action in the absence of a majority decision by the Commission in proposed § 580.10. We are disappointed by the NIGC's decision to remove language that would have affirmed the presiding official's recommended decision as final agency action in the absence of a majority decision. We urge the NIGC to abandon the approach proposed in § 580.10 of this proposed rule and reinstate the provision allowing a recommended decision to become a final agency action so that the appellant's rights to a full and fair hearing are protected consistent with due process principles.

Due process demands fundamental fairness in the manner in which agency proceedings are conducted, which necessarily requires impartiality on the part of the adjudicators. By automatically adopting the Chair's decision as final agency action of the Commission, the proposed rule deprives the appellant of a fair and impartial decision-maker to which it is entitled. While it is true that a recommended decision is "just" a recommendation, as stated in the preamble, such recommendation is supposedly based on the full and impartial consideration of the record by a qualified impartial presiding official. In light of this, we believe it is patently unfair to favor the Chair's disputed decision over a recommended decision issued by a neutral arbiter for purposes of final agency actions. We note that it is not uncommon for federal agencies to promulgate rules that allow for recommended decisions to be considered final agency actions if not otherwise acted upon.[2]

In addition to violating due process principles, the proposed approach in § 580.10 is also contrary to the purposes and goals of the appeals process established under IGRA. The IGRA vests the Commission with authority to hear and adjudicate appeals of decisions and orders of the Chair. Affirming the Chair's decision as final agency action in the absence of a majority decision by the full Commission thus undermines the entire purpose of the appeals process. Additionally, it undermines the checks and balances structure of the Commission by placing both decision-making *and* adjudicative authority in the Chair. In effect, it allows the Chair to serve as both the decision-maker with regard to the matter and the *sole* determiner of whether that decision was correct, which is both illogical and contrary to what Congress intended in establishing the Commission.

To ensure that an appellant's rights to a full and fair appeal are preserved throughout the appeals process, we urge the NIGC to revise proposed § 580.10 so that a recommended decision by the presiding official will constitute final agency action if the Commission is unable to reach a majority decision.

Request for Record on Which Decision Was Based

[2] *See e.g.*, 19 CFR 354.14, 49 C.F.R. § 1115.2.

As a final matter, the Chickasaw Nation requests the addition of a generally applicable provision under which an appellant may request that the NIGC disclose the record in the NIGC's possession that formed the basis for an agency action *before* filing an appeal. The exchange of information between the NIGC and the tribal government should be consensual, mutually respectful, and in furtherance of effecting compliance. We believe it is important for tribal governments to have knowledge of the facts underlying the matter *before* filing an appeal so that they can better assess the merits of the appeal in advance. Also, if a tribal government decides to move forward with its appeal, it will be better equipped in preparing its briefs and motions since they have already had access to the record and the underlying facts.

Proposed Part 581 –
Motions in Appeal Proceedings Before the Commission

Submission of Evidence (25 C.F.R. § 581.5)

Under proposed § 581.5, the Commission *may* allow additional evidence to be submitted at any time prior to the release of the Commission's final decision. However, we believe that it should be the appellants who *may* make additional submissions to the record as is provided for in proceedings before a presiding official in proposed § 584.8. Similarly, § 581.5 should be revised to provide clarity as to when the record is deemed closed so that the Commission may begin their decision-making process. Providing only that the record is open until the Commission releases their decision, which may occur at any time, creates substantial uncertainty in the amount of time available to a potential appellant to submit additional materials.

Motions for Reconsideration (25 C.F.R. § 581.6)

As drafted, proposed § 581.6 provides that motions for reconsideration of the final decision of the Commission may be made "only in *extraordinary* circumstances" (emphasis added). We are troubled by the requirement that the circumstances be "extraordinary," as it implies that motions for reconsideration will be considered rare exceptions rather than the norm. In our view, such a high and relatively unattainable standard for reconsiderations is contrary to the overall objective of the appeals process, which is to achieve an amicable resolution of a regulatory issue. The NIGC's appeals process should not be viewed as an adversarial process, but rather as a mutual effort in enhancing the integrity of tribal gaming operations. This regulation should not foreclose opportunities for the NIGC to work with tribal governments in achieving a mutually acceptable outcome with respect to a regulatory issue. We therefore ask that the NIGC revise this section to ensure that *any* party can file a motion for reconsideration without limitation as to the circumstances giving rise to the motion.

The thirty (30) day timeframe for filing a motion for reconsideration and the requirement that "only one motion and accompanying brief" may be filed are also problematic because they fail to take into account the long-term and ongoing nature of some enforcement matters such as civil fine assessments, the payment of which may be

made in installments over time. Such enforcement matters create an ongoing dispute-specific relationship between the NIGC and the tribal government. We believe that the proposed rule should not limit the ability of the tribal government and the NIGC to modify that dispute-specific relationship as new facts or arguments come to light.

Proposed Part 582 –
Appeals of Disapprovals of Gaming Ordinances, Resolutions, or Amendments

Filing Deadlines (25 C.F.R. § 582.3; § 582.5)

The Chickasaw Nation requests that the Commission carefully evaluate all filing deadlines contained in this Part, as well as Parts 583-585 for consistency and reasonableness. The general trend in this proposed Subchapter is that the Commission has reserved for itself ninety (90) days for issuing major decisions while appellants are typically allotted thirty (30) days to file a notice of appeal. Under proposed § 580.5, the appellant is subject to the harsh penalty of having "waived" their right to file if the deadline is missed. We believe it is unreasonable for the NIGC to assume that all tribal governments have the resources and capacity to file the requisite submission within these time frames.

Based on the NIGC's extensive knowledge and experience in working with tribal governments, the NIGC should be well aware that a decision to file an appeal must go through various decisional processes within the tribal government. The decision to move forward with an appeal is thus hardly ever a unilateral one. Reaching a consensus through tribal decision-making processes can involve many different actors and time-consuming processes such as convening council meetings and drafting tribal resolutions. Furthermore, even after the decision to file an appeal has been approved by the governing tribal body, the tribal government must then either obtain legal representation or employ its own legal counsel to prepare the necessary documentation. Given that the resources of tribal governments vary, not all tribal governments have the capacity to secure legal representation on such short notice.

With respect to the filing deadlines contained in proposed § 582.3, we ask that the initial filing deadline of thirty (30) days be increased to sixty (60) days from the date of the Chair's decision. We also ask that the timeframe for filing an appeal brief following service of the record be increased from fifteen (15) days to forty-five (45) days. As for the timeframe for filing a brief and supporting material in response to a submission to participate on a limited basis, we ask that the NIGC move the deadline from ten (10) days to twenty (20) days after service of the submission since the appeal brief will draw heavily from the record of the Chair's decision. We believe these amended timeframes will help reduce the expense and inconvenience of processing numerous motions for extensions of time in the future.

Proposed Part 583 –
Appeals from Approvals or Disapprovals of Management Contracts or Amendments to Management Contracts

Filing Deadlines (25 C.F.R. § 583.3)

Proposed § 583.3 provides that an appellant has thirty (30) days within which to file a notice of appeal and must file the appeal brief within fifteen (15) days of receipt of the record. As noted in the discussion above in our comments on proposed Part 582, we believe such a timeframe for filing an appeal is too short and should take into account the decisional processes that take place before an appeal is filed. We therefore ask that the filing deadline be moved from thirty (30) days to sixty (60) days from the time of the Chair's decision. We also ask that the timeframe for filing an appeal brief be extended from fifteen (15) days to forty-five (45) days since the appeal brief cannot be sufficiently completed until the tribal government is given information on the bases of the Chair's decision.

Proposed 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 Contract, and Notices of Late Fees and Late Fee Assessments

Filing Deadlines; Receipt of the Record (25 C.F.R. § 584.3; § 584.5; § 584.13; § 584.7)

We emphasize again the importance of evaluating all filing deadlines for reasonableness. For purposes of proposed § 584.3, we ask that the initial deadline of filing an appeal be increased from thirty (30) days to sixty (60) days from the date of the Chair's decision. With respect to the timeframe for filing the information and documentation required under proposed § 584.3(b), we ask that the NIGC give tribal governments a minimum of forty-five (45) days from receipt of the record to file such information. We note that, in a departure from Parts 582, 583 and 585, proposed § 584.7 does not require the Chair to release the agency record until the presiding official has been designated. Since a presiding official is not designated until 30 days after the NIGC has received a timely notice of appeal, this means that the appellant will not have access to the record until *after* the brief has been prepared and filed. We ask that proposed § 584.7 be revised to be consistent with these other Parts so that the appellant can rely on the information contained in the record in preparing the brief required in proposed § 584.3(b)(2).

Under proposed § 584.5(e), an appellant has five (5) days to respond to a motion to intervene by a third party. This time period should be changed to twenty (20) days, at a minimum. Finally, the Chickasaw Nation requests that at least forty-five (45) days be allotted to filing a brief containing objections to the presiding official's recommended decision under § 584.13.

Settlement Agreements (25 C.F.R. § 584.10)

The Chickasaw Nation requests that proposed § 584.10(a) be clarified to reflect that the pursuit of a settlement agreement to resolve issues in an appeals proceeding will

remain an option available to the appellant or parties at all times. We are concerned that proposed § 584.10(a) may be construed to deny parties the ability to pursue settlement options once the five (5) days before hearing "deadline" has passed. As we have noted throughout these comments, we believe the goal of this regulation should be to encourage parties to reach an amicable resolution of the matter, which may involve negotiations over a settlement agreement. Thus, we ask the NIGC to remove any language that might restrict the parties' abilities to pursue settlement options.

Proposed 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 Contract[s], and Notices of Late Fees and Late Fee Assessments

Filing Deadlines (25 C.F.R. § 585.2; § 585.5)

In this Part, proposed § 585.2 provides that an appellant has thirty (30) days within which to file a notice of appeal and must file the appeal brief within fifteen (15) days of receipt of the record. Potential appellants, however, should be given at least sixty (60) days from the date of the decision to file its appeal. As for the appeal brief, appellants should be allotted at least forty-five (45) days to prepare and submit its brief. And finally, under proposed § 585.5(e), an appellant has five (5) days to respond to an opposition brief submitted by a third party. We ask that this timeframe be increased from five (5) days to twenty (20) days.

Conclusion

In closing, the Chickasaw Nation greatly appreciates this opportunity to comment on Proposed Subchapter H and hopes that the Commission gives meaningful consideration to the above comments in the preparation of subsequent drafts.