PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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National Indian Gaming Commission
1441 L Street, NW
Suite 9100
Washington, DC 20005

Re: 25 CFR Part 547 – Proposed Rule for Technical Standards

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

On behalf of the Pechanga Band of Luiseño Indians ("Tribe"), I would like to thank the National Indian Gaming Commission ("NIGC") for the opportunity to comment on the Proposed Rule for 25 CFR Part 547, the Technical Standards for Class II Gaming. As you know, John Magee, Pechanga Gaming Commissioner, served as a member of the NIGC's most recent Tribal Advisory Committee for class II gaming and we appreciate the NIGC's willingness to work with Indian country on this vital issue.

We would like to begin by expressing our appreciation for the positive changes made to the draft regulation. In particular, we appreciate the change made to section 547.16(c), which in the discussion draft required a class II game to "continually" display the odds of achieving a top prize. This earlier language would have placed class II games at a disadvantage when mixed in and amongst class III games that are not required to display such a notice. Players would naturally be drawn to the game without the notice (the class III game), erroneously assuming that their chances of winning were greater. We also feared that this statement would have been misinterpreted to mean that the odds of achieving *any* prize in that class II game are remote. Deleting the word "continually" addresses this concern and we hope that this change is carried forward to any Final Rule.

The Tribe is also pleased to see the change made to section 547.16(b) regarding disclaimers. Again the discussion draft required that certain information be "continually displayed" to a patron. While this may be possible with certain equipment, such as the larger electronic player stations, it is wholly unacceptable for smaller devices such as handhelds or bingo minders. By the time these disclaimers are added to the device, no room will remain for the game to be displayed. And as technology grows and players begin to use their own devices (such as a cellular phone) to participate in a game, it will become impossible to comply with such a requirement. The change made in the Proposed Rule allows flexibility, such as the ability

to add the disclaimers to the game rules or to simply display the information once at the beginning of each game. Again, we hope this positive change remains in the Final Rule.

That being said, the Tribe respectfully believes that a couple sections of the Proposed Rule remain in need of modification. With regard to the definition of "agent" at section 547.2, we note that the definition no longer allows for a computer application to act as an agent. Tribes and operators should be able to utilize system features in lieu of human agents to minimize cost, speed patron service, and increase accuracy and security of transactions. Using a kiosk as an example, the class II system has the ability to validate portions of the payout transaction with greater speed and accuracy than any human. Plus, engaging such a feature protects against potential misappropriation. No longer allowing a kiosk to function in this manner could lead to unwarranted additional costs and potential human error, and do so unnecessarily, particularly in situations such as this where a system is far better suited to perform a task. To correct this, the following language should be added to the end of the definition: "This definition permits the use of computer applications to perform the function(s) of an agent."

The Tribe also believes that the regulation should continue to recognize tribes as the primary regulator of class II gaming. We therefore find it important that the following language be reinserted at §547.3 just before the section titled "State Jurisdiction": "TGRA Authority. Recognizing that the TGRA is the primary regulator of Class II gaming, nothing in this part is designed or intended to diminish TGRA authority."

With regard to section 547.17, we first note that the title of this section was changed from granting a "variance" to issuing an "alternate standard." We support this change as it better captures the intent of the section. This aside, it seems that Indian country would be better served by reverting to the language presented earlier by the Tribal Gaming Working Group ("TGWG"), or at a minimum by developing language that combines the NIGC's ideas with the TGWG proposal. For one, the TGWG version of this section allowed the TGRA to grant the variance and then notify the NIGC and provide an opportunity to comment on the variance. The NIGC draft requires that the NIGC approve the variance. A suitable compromise should be developed that better reflects tribal primacy in regulating class II gaming.

Concerns with the Grandfather Clause

Our primary concern with the technical standards is with the grandfather clause. As currently drafted, it would be impossible for anyone to comply with its requirements. Unless modified, *no new class II games or equipment could be added to any tribal gaming facility.* While we believe that some of these results are unintentional, others have not been altered from the Discussion Draft despite much comment. We discuss our concerns below.

1. *Drafting Concerns*

Our first concern with the grandfather clause is with sections 547.5(a) and (a)(1). While hopeful that this problem arises from a simple drafting error, unless corrected, this language would be fatal to the class II industry.

The preamble explains that a change made to §547.5(a) "was meant to convey that before any Class II gaming system manufactured prior to November 10, 2008, may be made available for use, it must meet the grandfathering requirements." Yet as currently drafted, sections 547.5(a) and (a)(1) provide that *all* class II gaming system software – even such software manufactured *after* November 2008 – would have had to be submitted to a testing lab *before* November 10, 2008, in order to be used. Of course it is now impossible to submit such software for testing *before* 120 days after November 10, 2008, regardless of when it was manufactured or placed into operation. And unless corrected, most if not all of our existing class II gaming systems would have to be removed from operation.

Regardless of the cause of this result, it needs to be corrected. We suggest that this error be corrected by modifying §547.5(a)(1) in relevant part to read: "... all Class II gaming system software that affects the play of the Class II game *and that was manufactured before November 10, 2008,* be submitted, together ...." Alternatively, the November 10, 2008, date should be updated to one in the future.

2. *Substantive Changes Have Been Made to the Grandfather Clause*

The NIGC remarks several times within the preamble that no substantive changes have been made to the standards that would cause a previously grandfathered game or system to become non-compliant. We respectfully disagree.

Both sections 547.5(a) and (b) reference § 547.14 of the technical standards and require testing to and compliance with the same. The language of § 547.14 however contains an important difference from the existing language. The existing § 547.14(b)(2)(i) provides that numbers produced by the random number generator must satisfy certain tests for randomness "which may include" a chi-square test, an equi-distribution test, or eight other enumerated tests. Yet the Proposed Rule specifies that three of these tests – the chi-square test, the runs test, and the serial correlation test – are "mandatory statistical tests for randomness." The Proposed Rule therefore converts previously *optional* tests into *mandatory* tests. In the event a game or system was not evaluated against these three tests in 2008 – which at the time were optional – the game and/or system will no longer comply with the grandfather requirements. And this is so even if the class II gaming system had been deemed "grandfathered" in 2008. It is therefore *not* the case that "[u]nder this proposed rule, any game that was certified as grandfathered based on the requirements in the current 547 remains certified" as stated in the preamble.

To address this problem, § 547.14 of the technical standards should be returned to its prior state to ensure that this section is indeed imposing no new requirements. Further, in order to properly capture the NIGC's stated intent, we request that language be added to clarify that nothing in the regulation is intended to prohibit the continued use of any class II game, component, or system that was previously certified against the grandfather provisions or any judicial ruling. We respectfully recommend the following language: "Nothing in this Part is intended to prohibit the continued use of any class II gaming system or component certified against any earlier version of these grandfather provisions or to outlaw play of any game ruled to

be class II by any judicial ruling." Regardless of whether this would impact the Pechanga Tribe or not, the NIGC should not implement regulations that place small and/or remote operations at a disadvantage, which is exactly what would happen if the NIGC outlaws these older, but still very playable games.

3. *Existing Class II Gaming Systems Should Not Have to be Retrofitted to Satisfy New Standards*

Our review of the Proposed Rule indicates that existing non-grandfathered class II gaming systems (assuming here to be those manufactured on or after November 10, 2008) will be treated in the same manner as those manufactured after the effective date of this regulation. While is seems appropriate to require new class II equipment to satisfy the new technical standards, the Tribe believes it is inappropriate to require the same of existing equipment. We therefore urge the NIGC to rewrite the technical standards such that equipment *manufactured* after a certain date must comply with these standards. This option seems the most fair and is one that comports with the general policy of the federal government. When the U.S. Government makes changes applicable to the automotive industry, for example, manufacturers are not required to retrofit all cars on the road, and owners are not required to discontinue their use. Instead, all cars manufactured *after* a certain date must meet the new requirements. This solution is reasonable and does not impose an unfair burden on either the manufacturer or the current owner of the car. The same idea should be implemented here.

The preamble also requests input as to the ramification of "future repairs, replacements, and modifications" made to existing class II equipment. In particular, the NIGC asks whether such events should trigger the requirement that such equipment be made compliant with the new technical standards. The Tribe disagrees that a simple repair, replacement or modification to a class II gaming system should trigger full compliance with the new technical standards. And because the components of a class II system are so dependent upon one another, a repair, replacement or modification to one component would seemingly trigger the need to replace the entire system – at an often prohibitively high cost. Unless a Tribe elects to replace the entire system with a new class II gaming system, an existing system, game or component should not have to come into compliance with standards that did not exist at the time it was manufactured.

4. *Opposition to the Sunset Clause*

As noted in the preamble, the NIGC is also considering whether to institute a new "sunset clause" or remove it in its entirety. Under the current sunset clause, all existing grandfathered games will either have to come into compliance with the new standards next year or be removed from operation.

The Tribe does not support a sunset clause, regardless of length. To say that one day a game is acceptable, but that the next it is somehow deficient, is incomprehensible unless something has actually happened to corrupt the game. And thus far, no evidence has been provided that either grandfathered games or existing non-grandfathered games present some hidden danger. An arbitrary date should not be set after which an entire category of games are

deemed unsuitable. If there is truly something wrong with the game, the TGRA will act to correct it. Otherwise, the NIGC should let the market decide when games should be removed from operation.

On behalf of the Pechanga Band of Luiseño Indians, I again thank you for the opportunity to provide comment on these important topics. Please let me know if you need any additional information or have any questions.

Respectfully,

Mark Macarro, Tribal Chairman
Pechanga Band of Luiseño Indians