Iowa Tribe of Oklahoma

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August 15, 2012

Ms. Tracie Stevens, Chairwoman
Ms. Steffani A. Cochran, Vice-Chairperson
Mr. Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005

Re: Proposed Rule of 25 C.F.R. Part 547: Proposed Class II Technical Standards

Dear Commissioners:

Thank you for providing the Iowa Tribe of Oklahoma ("Tribe") the opportunity to comment on the National Indian Gaming Commission's ("NIGC") proposed rule of the Class II Technical Standards ("Proposed Rule") published at 77 Fed. Reg. 32465 (June 1, 2012). As a tribal government who relies heavily on Class II gaming as a major source of revenue, we have long recognized the fundamental importance of developing technical standards that will safeguard the integrity and security of the Class II gaming industry. It is in this spirit that we submit the following comments and recommendations for revising the existing Class II Technical Standards in a manner consistent with the purposes and goals of the Indian Gaming Regulatory Act ("IGRA") and the operational realities in which they will be implemented.

As an initial matter, the Tribe would like to express its support for the NIGC's use of the Tribal Advisory Committee ("TAC") and the Tribal Gaming Working Group ("TGWG") in identifying areas of concern and developing recommendations for improving the effectiveness and clarity of the Class II Technical Standards. Many of the issues in both the existing and proposed Class II Technical Standards are technical and complex in nature and warrant careful consideration by those tribal operators, regulators, and industry representatives directly affected by the final rule. We have been closely following the work of the TACs and TGWG during this rulemaking and are confident that their proposed revisions and recommendations, if taken seriously, will lead to a final rule that reflects a consensus that is at least minimally acceptable to tribal governments.

I. GRANDFATHERING PROVISIONS

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I. GRANDFATHERING PROVISIONS

The revision of the grandfathering provisions in the Proposed Rule has emerged as one of the key issues during this rulemaking process. There appears to be a great deal of uncertainty surrounding the proposed language in the provisions addressing grandfathered Class II gaming systems, some of which appears to have been addressed with the recent issuance of the NIGC's Bulletin No. 2012-02. The NIGC's Bulletin clarifies the NIGC's intent in relation to the operation of the proposed sunset clause and makes clear that any Class II gaming system manufactured before November 10, 2008, can remain in operation after the sunset date of November 10, 2013, provided that it has been brought into compliance with the technical standards.

Our concern, however, is that the proposed grandfathering clause is drafted such that it reads inconsistently with the NIGC's Bulletin. The proposed rule defines a grandfathered Class II gaming system to include all Class II gaming systems manufactured before November 10, 2013, regardless of whether they have been certified or brought fully into compliance with 25 C.F.R. Part 547. Thus, under the proposed sunset clause, which states that "Grandfathered Class II gaming systems may continue in operation for a period of five years from November 10, 2008," all Class II gaming systems manufactured before November 10, 2013, must be removed from operation by November 10, 2013. This could prove economically disastrous for many tribal governments who have made substantial investments in their Class II gaming systems.

While the NIGC's Bulletin reassures tribal governments that such outcome is not what was intended with the proposed language, it does not address the drafting issues that we have identified. To ensure that the final rule accurately reflects the NIGC's stated intent in its Bulletin, we believe substantive revisions to the grandfathering provisions are necessary and appropriate. We have outlined some of those revisions for your consideration below.

In the proposed rule, the NIGC requests information from tribal governments regarding their Class II systems in order to assess the potential impact of the proposed grandfathering provisions on tribal gaming operations. While we appreciate the Commission's effort to reach out to tribal governments and better understand the potential impacts of its proposed rule, we do not believe we are in a position to provide the Commission with such information at this time. With respect to the specific impacts to our gaming operations, we note that such information is largely dependent on the NIGC's final actions on the grandfathering provisions and that we are thus unable to provide the NIGC with a full economic analysis of the different scenarios described in the preamble. We can, however, state generally that, without substantive amendment, the proposed grandfathering provisions, as drafted, will operate to cause tremendous economic harm to tribal governments and the Class II gaming industry. The potential costs to tribal governments will have a devastating impact on a vitally important segment of the tribal gaming industry.

Should the NIGC determine that further information is needed to determine whether and which amendments are necessary, we would urge it to undertake a cost-benefit analysis in accordance with Executive Order 12866, which requires agencies to conduct a regulatory analysis of significant proposed actions. We note that other independent regulatory agencies such as the Federal Communications Commission and the Securities and Exchange Commission regularly conduct cost-benefit analysis in their rulemakings. We strongly believe that an economic analysis of the proposed rule will provide the NIGC with the necessary information and evidence to show that its proposed action is the least costly, most cost-effective, and least burdensome alternative.

With these general comments in mind, we now offer the following specific comments on the proposed rule:

A. Revise the Definition of a Grandfathered Class II Gaming System

The Proposed Rule currently defines grandfathered Class II gaming systems as "all Class II gaming systems manufactured before November 10, 2008, and certified pursuant to paragraph (a) of this section." We believe this definition is problematic and in need of revision because it fails to include existing non-grandfathered Class II gaming systems that have already been certified as compliant under the existing technical standards. It also operates to create 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.

We recommend broadening this definition to include *all* Class II gaming systems that have been certified prior to the effective date of the new final rule, not just those systems manufactured before November 10, 2008. We believe our recommended definition will help draw a clear distinction between those systems certified under the existing 25 C.F.R. Part 547 and those systems certified under the new final rule. Using the November 10, 2008, date of manufacture as the basis for the regulatory definition of a grandfathered Class II gaming system makes little practical sense and only increases the potential for confusion.

Furthermore, we believe our recommended definition will make it much simpler for the NIGC to revise its technical standards in the future because it eliminates the need to develop new language to address multiple categories of grandfathered systems with each revision. Should the NIGC decide to revise the Class II Technical Standards sometime in the future, our recommended definition of a grandfathered Class II gaming system would remain applicable and relevant since it applies to any Class II gaming system certified prior to the effective date of the new final rule.

B. Remove the Sunset Clause in its Entirety.

The new final rule should be amended to reflect that all grandfathered Class II gaming systems can continue operating indefinitely unless and until the systems pose a threat to the

integrity and/or security of the Class II gaming industry. In our view, the sunset date of November 10, 2013, is unwise, unnecessary, and unrelated to the Commission's regulatory objective. There is no basis to conclude that a compelling public need exists to remove grandfathered systems from operation simply because they were manufactured prior to November 13, 2008. Among other effects, the proposed sunset clause has the potential to cause significant economic harm to tribal gaming operations and place many tribal governments, including the Nation, at a competitive disadvantage relative to other gaming operations that have not made similar investments in grandfathered gaming systems.

It does not appear as though the approach to grandfathered systems taken in the Proposed Rule is the best available method of achieving the regulatory objective of protecting the integrity and security of Class II gaming activities. The benefits of the proposed grandfathering provisions simply do not justify the potential costs to tribal governments. To address these fundamental deficiencies in the Proposed Rule, the Commission should craft an alternative approach that achieves the same regulatory goals in the least burdensome and most cost-effective manner. We believe a more reasoned regulatory approach would be one in the proposed sunset clause is eliminated in its entirety so that grandfathered Class II gaming systems can continue in operation indefinitely until such systems pose a threat to the public health and safety and/or the security and integrity of tribal gaming operations.

C. Apply the Final Rule Prospectively.

Generally, grandfather clauses are used in statutes and regulations to allow the current status of something pre-existing to remain unchanged, despite any future changes in the regulation or statute. As drafted, however, the grandfathering clause in the proposed rule does not operate to produce this result. It appears that once the new final rule becomes effective, any Class II gaming system that has been certified pursuant to the existing 25 C.F.R. Part 547 will be subject to the new testing requirements and standards in the new final rule.

The new final rule should, however, only apply to those systems that have not been certified under the existing 25 C.F.R. Part 547. In other words, the applicable standards contained in the new final rule should be applied prospectively and should have no effect on the status of Class II gaming systems certified under the existing regulation.

II. SPECIFIC COMMENTS

A. § 547.5(c)(4) Player Interface Testing. This provision requires the testing laboratory's written report to confirm that each player interface has been certified in accordance with applicable standards. It is uncommon, however, for testing laboratories to test each and every player interface going out on the gaming floor, as such testing would be unnecessarily onerous and time-consuming. It is our understanding that models of player interfaces are typically used for testing purposes. We respectfully request that proposed § 547.5(c)(4) be

amended to reflect that "submitted model(s) of a player interface" must be certified against applicable standards.

B. § 547.8(b)(1) Game Initiation and Play. In the preamble, the Commission explains that that the words "automatic or" were not removed from the Proposed Rule since "[a]ny rule should be disclosed to the patron prior to initiation of game play, and any rule change to the game must be disclosed to the patron." While we agree with the importance of ensuring that the rules of the game are fully disclosed to the patron, we are concerned that by prohibiting "automatic" changes, the Proposed Rule may inadvertently limit the use of certain technologies that make "automatic" changes, but otherwise provide clear and full disclosure of the rules. To address our concerns, the sentence "There must be no automatic or undisclosed changes of rules" should be amended to read as follows: "*Undisclosed changes of rules are prohibited.*"

C. § 547.14(f)(4) Bias Reporting. This section provides that an RNG must "[u]se an unbiased algorithm and *any* bias must be reported to the TGRA" (emphasis added). We are concerned by the lack of thresholds in the bias reporting requirements and the impracticality of requiring any bias to be reported. We note that a workable threshold has already been established in the Commission's Bulletin 2008-4, which clarified that the threshold for reporting a bias should be 1 in 50 million. We believe that a measured bias of 1 in 50 million is a reasonable threshold and should be incorporated into this provision in the final rule.

In closing, the Tribe wishes to thank the Commission for this opportunity to submit comments on the Proposed Rule. We hope that you will carefully consider our views as you deliberate on how best to proceed with the final rule, and in particular in relation to the grandfathering provisions.

We appreciate the Commission's attention to these comments.

Sincerely,

/s/

Janice Rowe-Kurak, Chairwoman
Iowa Tribe of Oklahoma
Business Committee