Nez Perce

TRIBAL EXECUTIVE COMMITTEE
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April 23, 2012

Via Electronic Mail: reg.review@nigc.gov

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

Re: Preliminary Discussion Draft of Class II Technical Standards

Dear Chairwoman Stevens:

The Nez Perce Tribe offers the following comments on the National Indian Gaming Commission's (NIGC) discussion draft of 25 C.F.R. Part 547, which set forth the Technical Standards for Class II gaming. The Tribe appreciates the opportunity to submit written comments on the preliminary discussion draft of revisions to the Class II Technical Standards and ask that you give favorable consideration to the comments provided below.

As an initial matter, we would like to express our support for some of the changes being proposed in the discussion draft. We are pleased that the NIGC has removed references to "entertaining displays" in relation to Class II player interface display requirements. The existing Technical Standards place regulatory significance on the "entertaining display" on Class II player interfaces, despite the fact that entertaining displays have no legal significance whatsoever to the outcome of a bingo game. In doing so, the existing regulation only confuses the reality of the game and increases the potential for patron disputes.

And finally, we appreciate the NIGC's proposed removal of the provisions requiring Underwriter's Laboratory testing of player interfaces. The establishment and enforcement of electrical product safety standards is an important function that we believe falls more properly within the authority of tribal governments. Moreover, we note that such standards are already subject to the jurisdiction of other federal agencies.

While we recognize and appreciate the favorable changes identified above, there are several outstanding issues that we believe warrant additional consideration by the NIGC, the most important of which concerns the grandfather provisions in the discussion draft.

1. 25 C.F.R. § 547.5: Grandfather Provisions

Despite the strong objections raised by the Tribal Advisory Committee, the Tribal Gaming Working Group, manufacturers, and tribal governments, the NIGC has decided to retain the substantive requirements of the grandfather provisions. The discussion draft still requires all grandfathered Class II gaming systems to be retired and removed from operation by November 10, 2013. In addition, the grandfather provisions apply only to those gaming systems that were manufactured or placed in a tribal facility on or before November 10, 2008. It seems unfair and inappropriate for a federal agency to promulgate a rule that has retroactive application to products already in the marketplace without a compelling need such as a life-threatening defect in the product. We can think of no administrative agency, including those with specific statutory authority to promulgate product standards that would require a general recall of products in the marketplace without a showing of a defect or flaw that poses an imminent threat to human life.

In fact, the Supreme Court has ruled that "federal regulations do not, indeed cannot, apply retroactively unless Congress has authorized that step explicitly." Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). Nothing in the IGRA indicates that Congress intended for the NIGC to promulgate retroactive regulations with respect to product safety standards. Moreover, we note that grandfathered Class II gaming systems have been operating without safety or integrity issues for many years.

We are concerned that the NIGC may not yet understand the full scope of harm that is threatened by its grandfather provisions, which applies to even those systems that have been approved by federal courts. Many millions of dollars have been spent in the development of Class II gaming systems and in litigation to vindicate the lawfulness of such systems. Tribes have invested hundreds of millions of dollars in their construction of gaming systems based solely on the lawfulness of these products and the availability in the marketplace. If left unchanged, the five-year sunset clause would effectively invalidate federal court decisions that have sanctioned the use of certain gaming systems and create a substantial hardship on tribal gaming operations and interdependent industries. The forced removal of certain gaming products would create competitive imbalances by seriously disadvantaging those tribes that have invested in the development of gaming facilities based on the legal permissibility of such products.

We note that the protection of grandfathered systems is necessary for not only economic reasons, but also for purposes of dealing with states in compact negotiations. Tribes are required to negotiate gaming compacts in good faith under IGRA; protection of these systems under the regulations or by a federal court decision can provide tribes with additional leverage in ensuring that states meet this duty of good faith when negotiating compact provisions.

For the foregoing reasons, we ask the NIGC to reconsider the five-year sunset clause and add language that will authorize the continued use of any Class II system component previously certified or validated through judicial proceeding. We also ask that the regulation account for future certifications of systems that have already been certified or approved by a federal court decision.

Additionally, we ask the NIGC to resolve a major oversight in the discussion draft which operates to invalidate pre-existing certifications issued by the TGRA. As drafted, the changes in the discussion draft pose additional requirements that will affect the certified status of currently compliant Class II gaming systems. More specifically, the discussion draft imposes new rules on previously certified products that make it virtually impossible for any certification to remain valid. There is an element of impossibility in maintaining certified status since certification is based on standards that were unavailable at the time of certification.

2. 25 C.F.R. § 547.2: Definition of Proprietary Class II System Component

It is unclear why a definition of a Proprietary Class II System Component has been added to the regulation given that the term is not used anywhere in this Part. Since the term adds no value to the regulation and only creates confusion as to its applicability, we ask that it be removed or, in the alternative, clarified so that tribes can understand how the term will be used.

3. 25 C.F.R. § 547.2: Definition of Reflexive Software

The definition of "reflexive software" should be revised to clearly identify the harm associated with the term – that is, the denial of a prize to which the player is otherwise entitled based on the random outcome of the game. Such a change would also make the definition more consistent with the industry's understanding of reflexive software in the Class II gaming context.

4. 25 C.F.R.§ 547.3(a): Regulatory Authority of TGRAs

This section provides that TGRAs "*also* regulate Class II gaming," which is inconsistent with the regulatory framework established under IGRA that vests tribes with exclusive and primary regulatory authority over their gaming activities. We ask that the NIGC amend this provision to clarify that tribes are the primary regulator of their gaming operations.

5. 25 C.F.R.§ 547.7(d): Player Interface

In light of existing gaming technology that utilizes hand-held devices rather than machines, we ask the NIGC to consider revising this provision to read that player interfaces must *bear* rather than *display* the serial number and other information.

In closing, we would like to reiterate our appreciation for this opportunity to provide the above comments on the discussion draft of the Class II Technical Standards. We look forward to working with the NIGC as it moves through the rulemaking process.

Sincerely,

Brooklyn D. Baptiste
Chairman