POARCH BAND OF CREEK INDIANS

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National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005
Via email: reg.review@NIGC.gov

Re: Proposed Rule – 25 CFR Part 547, Technical Standards for Class II Gaming

Dear Commissioners,

On behalf of the Poarch Band of Creek Indians, I thank you for the opportunity to comment on the National Indian Gaming Commission's Proposed Rule for 25 CFR Part 547, the Technical Standards for Class II Gaming. Class II gaming is of vital importance to us and we appreciate that the NIGC is moving forward with these technical standards. We know they will be of great benefit to the gaming industry.

As conveyed in our comment on the Discussion Draft, our principal concern with the Technical Standards is with the grandfather clause. When Part 547 was originally finalized, a 5-year grandfather clause was incorporated to accommodate older technology. In order to be grandfathered, class II gaming systems had to be submitted to a testing lab by November 10, 2008. We have identified several concerns with this language as it appears in the Proposed Rule.

First, the Tribe does not support a "sunset" clause. We note that the existing grandfather period is set to expire (or "sunset") next year. We also note that the NIGC is considering whether to extend the sunset clause by lengthening the grandfather period. Another option is to remove the sunset clause in its entirety. The Tribe supports this last option. We have never understood how a game can be safe and reliable one day, but not the very next. And thus far, no evidence has been provided that 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, the TGRA will act to correct it. Otherwise, the NIGC should let the market decide when games should be removed from operation.

Second, we are also concerned with the manner in which existing but non-grandfathered class II games will be treated. Will a new grandfather clause be instituted or will these games be expected to satisfy the new standards – standards that did not exist at the time they were manufactured? While it may be appropriate to require *new* class II gaming systems to satisfy *new* technical standards, it is unacceptable to require the same of existing systems. The technical standards should be written so that only equipment *manufactured* after a certain date must comply with the new standards. Using the automotive industry as an example, when changes are made to applicable regulations, 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.

And the Tribe believes that this same idea should be applied to "future repairs, replacements, and modifications" made to existing class II equipment. Notably, the NIGC asks in the preamble whether such events should trigger full compliance with the new technical standards. Because the components of a class II system are so interrelated, if such a requirement was imposed, a simple repair, replacement or modification to one component could very well trigger the need to replace the *entire* system. This is unacceptable. And even if this is not the case, existing games and systems should only be held accountable to technical standards that were in effect at the time of manufacture. Unless a Tribe elects to replace the entire system, a simple repair, replacement or modification should not cause the same to then have to comply with standards that did not exist at the time of manufacture.

Third, we are very concerned with what we hope is simply the result of a drafting error. Sections 547.5(a) and (a)(1) of the Proposed Rule read:

> "(a) *Limited immediate compliance.* A tribal gaming regulatory authority shall:
>
> "(1) Require that all Class II gaming system software that affects the play of the Class II game be submitted, together with the signature verification required by § 547.8(f), to a testing laboratory recognized pursuant to paragraph (f) of this section within 120 days after November 10, 2008; ...."

Nothing limits the applicability of this language. As a result, *all* class II software – even class II 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 class II software for testing *before* 120 days after November 10, 2008, regardless of when it was manufactured or placed into operation. And while we do not believe this was the Commission's intent, unless this language is corrected, we will have to remove most if not all of our class II games from operation.

We note that these same sections in the Discussion Draft required only that those "Class II gaming systems available for use at any tribal gaming facility that were manufactured or placed in a tribal facility on or before November 10, 2008" had to comply with this section. Further, in accordance with §547.5(a)(1), only "Class II gaming system software that affects the play of the Class II game *and was in operation prior to November 10, 2008*" (*emphasis added*) had to have been submitted to a testing laboratory "within 120 days after November 10, 2008." Read together with the related commentary in the preamble, we believe the problem results from a drafting error. And we suggest that this error can be corrected by modifying section 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 far in the future.

Fourth, we again urge the NIGC to include language clarifying 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 found to be class II by any judicial ruling. The NIGC should not act to invalidate a court's decision that a certain game is class II. It is vitally important that any class II gaming system component that has previously been certified or validated through judicial proceeding remain available for use by tribes as they deem warranted. Eliminating the availability of these games could create competitive imbalances and financial hardships. The continued classification of these games as class II is critical to the longevity of class II gaming and Indian gaming as a whole. Regardless of whether the Tribe may even want to play these games, they provide critical ammunition in our continued operation. To avoid this result, we respectfully recommend adding 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."

Adding such language is also important as, despite statements to the contrary in the preamble, our review of the regulation indicates that substantive changes *have* been made that would cause a previously grandfathered game or system to become non-compliant. For example, we note that both §§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 all three of these tests in 2008 – tests that 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 asserted in the preamble.

A number of changes made to the Discussion Draft are positive and we hope that they remain in any final rule. For one, we appreciate that the definition of "Proprietary Class II System Component" was deleted. Given that the term is not used in the regulation, and because the definition provided could have caused confusion, its removal was appropriate. We also appreciate and support the changes made to the definition of "electromagnetic interference." This revised definition was supported by the Tribal Gaming Working Group ("TGWG") and the NIGC Tribal Advisory Committee and ensures consistency with gaming jurisdictions throughout the world. The Tribe is also pleased to see the change made to §547.16(b) regarding disclaimers.

Requiring that certain information be "continually displayed" to a patron would have been impossible on most smaller class II devices, and as such, this revision is also a positive one. And finally, we support the change made to §547.5(c)(3) enabling the TGRA to set certain testing standards rather than mandating compliance with unknown federal laws. Each of these changes should carry forward to any final rule.

That being said, a number of sections outside the grandfather clause also remain in need of modification. The TGWG had suggested adding the following language to §547.5(b): "Nothing in this section is intended to prevent a TGRA from approving a grandfathered component to be added to a fully compliant Class II gaming system, or affect the certification of a fully compliant Class II gaming system." This language is important because the regulation currently does *not* allow the addition of a grandfathered component to a compliant system without transforming the *entire* system into a grandfathered system. Such a result, of course, would be unacceptable as a lot of time, money and energy have been invested into obtaining system approval under Part 547. A compliant class II gaming system should not lose its approved status by adding a grandfathered component. Further, the addition of this sentence is in-line with the intent expressed by the NIGC in its August 8, 2012 Bulletin regarding the grandfather provisions.

With regard to the definition of "agent," we continue to believe that Tribes and operators should be able to utilize computer applications 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 can validate portions of the payout transaction with greater speed and accuracy than any human. Not allowing a kiosk to function in this manner could lead to additional costs and potential human error, both of which are unnecessary as the system is far better suited to perform such 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."

Also, with regard to §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 TGWG's language, or at a minimum by developing language that combines the NIGC's ideas with those of the TGWG. 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 the tribal primacy in regulating class II gaming.

We also must mention that the TGWG proposed adding the following language at §547.2(b): "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." The NIGC deleted this section from its Discussion Draft. We continue to believe that tribal primacy in the regulation of class II game should be recognized. This language should be added to §547.3 of the Discussion Draft just before the section titled "State Jurisdiction."

On a final note, we respectfully request that the NIGC publish the technical standards once more as a proposed rule before going final. Doing so will ensure that the potentially fatal issues identified above are resolved.

The Poarch Band of Creek Indians thanks you for the opportunity to comment on Part 543 and 547. Please let me know if you need any additional information or have any questions.

Sincerely,

Stephanie A. Bryan

Stephanie Bryan, Vice-Chair
Poarch Band of Creek Indians