



April 4, 2005

Michael Fletcher, CEO
NOVA Gaming, Inc.
PO Box 51356
Piedmont, SC 29673

Subject: NOVA Gaming Bingo System

Dear Mr. Fletcher:

You requested an advisory opinion on whether the NOVA Bingo System¹ (Nova System) game developed by NOVA Gaming, LLC (Nova) may be classified as a Class II gaming activity as that term is defined in the Indian Gaming Regulatory Act (IGRA) and in regulations of the National Indian Gaming Commission (NIGC).

Based on our review, we conclude that the Nova System qualifies as bingo, as that term is used in IGRA and as defined by NIGC regulations, and is a Class II game. The particular version of the game to which this opinion applies is 4.2.0.12. This opinion does not apply if the game is modified, if additional features are added, or if played in a manner different from the manner described in this opinion. The features discussed in this opinion, along with the manner and sequence of events in game play and the minimum timeframes described, are integral to our opinion. Furthermore, the NIGC is in the process of developing regulations further interpreting the statutory criteria of bingo. Consequently, when those regulations are final our views on the classification of this game may be revised.

We advised NOVA that we would require the submission of a laboratory report that evaluates the operating system and software and confirms that the Nova System operates in the manner described in this opinion. On May 24, 2004, we received a copy of a laboratory report issued by Gaming Laboratories International. This report confirmed the operational characteristics of the Nova System. On July 9, 2004, we viewed a live game demonstration in our office. At that time, it came to our attention that, with respect to interim prizes, higher bettors had more interim patterns available to them and consequently more opportunity to win than lower bettors. We advised you that we would

¹ The Nova Bingo System supports many different game themes with different graphics. This opinion covers any graphic theme NOVA wishes to use, so long as the Bingo System operates exactly as described in this opinion and the graphic theme has no substantive impact on game play.

require that all players, regardless of buy-in level, have the same opportunity to win interim prizes, although the prize amounts associated with these winning patterns could vary depending on the buy-in level. On January 18, 2005, you provided us with a laboratory report prepared by BMM Test Labs, which confirmed that you had made the required modification. On February 2, 2005, we viewed a live demonstration of the modified game. On March 21, 2005, we received information on the game signature from BMM Test Labs. The signature may be used to verify that the game in play in a gaming facility is the game considered in this classification opinion.² On March 28, 2005, we received a supplemental verification of the Nova Bingo System from BMM. This report confirmed that the Central Server verifies that there are at least two players on the system and then waits anywhere from 2-10 seconds for additional players to log in, based on the number of active terminals in play on the system.

Mechanics of the Game

The Nova System is a linked bingo system played within a gaming facility and/or among gaming facilities.

System Overview

The system consists of four functional groups:

- One Player Terminal
- One Central Server
- One Point-of-Sale Terminal
- One Management Terminal

The Central Server is used to validate users on the Point-of-Sale and Player Terminals and run the Management Terminal software. All system and gaming information for the Point-of-Sale and Player Terminals is handled by the Central Server. It controls all read/write to the database, all communications to all devices, all ball calls and all data logging. The Management Terminal is the interface for system and game configuration, reporting, and user security. The Point-of-Sale Terminal is the financial interface that allows players to create new accounts, modify existing accounts, and cash out accounts. All player data is transmitted from the Point-of-Sale Terminal to the Central Server and stored in the database. The electronic Player Terminal is the game play interface with the player and is directly connected to the Central Server.

The Nova System is a linked electronic bingo system played within a gaming facility and optionally linked to other gaming facilities. Players compete against one another within the facility and against all players in linked facilities.

² The BMM signature for the Game Central Server is 09c30005e05092044fb902645ba5ca741ceb530d.

Player Terminal Overview and Display Screen Description

The game terminal will play a themed game with graphical displays. There are many themes, but all play on the Nova System and operate as described. Prize tables may vary among game themes, but all game themes utilize a common bingo pattern set.

The display for the game screen has several parts. In the center of the screen is an animated reel set, much like one you would see on a video line game. The left side of the screen shows a box with the player's bingo card, below the card is an empty space where the ball call for the game will appear once the game starts. The player's bingo card is a 5 x 5 grid, measuring 2.5" x 2.5" with the word 'BINGO' atop the columns. The 5 columns of the bingo card are labeled B-I-N-G-O. Each column contains 5 numbers (B 1-15, I 16-30, N 31-45, G 46-60, and O 61-75). The bingo card has a black background with white lettering in 26 point bold font. Below the card is a flash board where called balls are displayed. Below the flashboard is a display showing the game ending pattern, which is "COVERALL." In the lower right corner there is a box that displays the following information: Bet; Lines; Paid; and Credits representing credits bet, lines bet, credits paid, and credits available to play respectively. By touching this box a player can toggle between the number of credits and the cash value of those credits. The upper right corner of the display has a small graphic showing the denomination of credits for the game. The game can be played at various denominations. The denomination displayed is that which is currently being played. However, by touching this value a player can choose among the denominations available to play. Along the bottom row of the screen there are the following buttons: HELP; BET LINE; BET MAX; BET ONE; and DAUB. At any time by pressing the HELP button, a player will find an explanation for all aspects of playing the game. On the very bottom of the screen is a game status bar that displays assorted game related messages.

A player can also choose an alternate game play view. Below the flash board in which the ball call appears is a bar labeled "BINGO CARD VIEW." By touching the "BINGO CARD VIEW" button players can view a larger version of their Bingo Card instead of the video reels. To the right of the Bingo Card is a flash board where called balls are displayed. Below the flashboard is a display showing the game ending pattern, which is "COVERALL." Beneath the ball call box appears the bar with the label "REELS VIEW." By touching the "REELS VIEW" bar the player can switch back to the Reels View. Everything else on the screen remains the same.

When the game is not being played the video screen cycles through the game play screen, the pay table, and a theme specific graphic with the prompt "Insert Cash" or "Card to Play."

The player can bet different lines and multiple credits per line. The winning bingo patterns can be viewed via the PATTERNS button in the Help menu. The winning bingo

patterns are categorized by number of lines bet and credits per line bet. The lines are highlighted in red as you choose to play them. Increasing the number of coins bet per line increases the possible winning prize. The player can select to bet up to nine lines and up to five credits per line by touching the BET MAX button. The player can instead also choose to bet one to nine lines using the BET LINE button and one to 5 credits per line using the BET ONE button. Players must bet the same number of credits for each line they play. The wager amount determines the payout amount, but in all cases every player competes using the same interim patterns and game winning pattern and ball call.³

Progressive prizes are offered for certain patterns, and are handled as any other interim prize. The progressive pattern must be successfully daubed in time within the first 24 numbers called. There are always at least two releases of numbers and no prizes can be awarded on the first release. In the event that multiple players cover the pattern associated with the progressive prize in the same game, the progressive prize is shared among the winning players.

Game Play on Player Terminals

The player(s) open a new account at the Point-of-Sale terminal where the player is issued a card or at the game terminal when a player inserts money into the terminal. If done at the Point-of-Sale terminal, the cashier enters the player's name for the new account. The player then enters his/her choice of PIN (4-8 digits in length) on the keypad and confirms the PIN by entering it a second time. The player gives the cashier the amount desired to be deposited into his/her account. The cashier enters this sum into the Point-of-Sale. A player club card is then printed by the card printer and given to the player.

If the player is using a player's card, the player inserts the card into the game terminal and inputs his/her pin. Once a player has logged in, their account balance will be displayed on the terminal. The player card is used for identification only; no money is actually transferred to the card. If a player adds cash to the Player Terminal after having inserted his/her card, credits will be added to the player's account.

In the "Nova Gaming System," games are played in groups called sessions, which is considered to be any bingo game played using the same ordered pool of bingo numbers. All players enrolled in a common session will be competing for the intermediate winning prizes and game-ending patterns.

³ One specific issue discussed with NOVA Gaming representatives is the value of the prize awarded to the game-winning player. The pay tables as currently constructed provide a minimum prize to the first player covering the game winning pattern that is substantially less than the amount wagered by that player. The NIGC is currently developing classification and technical standards for Class II bingo played through electronic medium that may affect this aspect. The current working draft for the classification standards specifies a minimum prize of 20% of the amount wagered by the game-winning player. NOVA Gaming representatives understand that a change to the game may be required if the Commission adopts the classification standards with this provision.

The game status bar prompts the player to "PLACE YOUR BET. HIT DAUB TO PLAY." Bingo cards are electronically stored in the Central Server and distributed to the players on demand. By touching the Bingo Card, the player can change the card with which they will play the game. The player then chooses to bet one to nine lines and one to five credits per line.

After the player has selected the number of lines, number of credits per line and a Bingo Card to play, the player touches the DAUB or PLAY button. The server verifies that there are at least two players on the system for play to begin and that a player has enough credits in their account to cover the wager. An adaptive algorithm is used to allow more time for additional players to join based on the number of active game terminals. If there is only one player, the game status bar displays "WAITING FOR MORE PLAYERS. CURRENT WAGER IS..." The game will let 30 seconds transpire before the game will abort with the message, "GAME ABORTED – NOT ENOUGH PLAYERS – TRY AGAIN." appearing in the status bar. The player's account is not debited until the player has successfully joined a game.

When the Central Server has determined a new game can begin, it starts drawing balls for the game. There are always at least two releases of numbers and no prizes can be awarded on the first release. In some cases the player may cover more than one interim bingo pattern, and will be awarded the highest paying pattern only. If the player covers an interim pattern and the game winning pattern, they will be paid for both the game winning pattern and the highest paying interim pattern.

Once a new game begins, the Central Server draws the first set of numbers (*Release #1*) which consists of 2 balls. At the same time the video reels on the Player Terminal screen begin to spin. The smallest interim pattern is a 3 spot pattern, thus there can be no winners within the first release. Numbers are drawn from a set of 75 numbers (1-75). The Central Server's random number generator determines the numbers. The numbers in the first release are determined when the game begins and are transmitted in real time from the Central Server to all Game Terminals that have joined into that game and are displayed on the flash board of each Game Terminal in the order that the balls were drawn.

Once the balls have been displayed to the player, all players have the opportunity to daub the numbers within a predetermined period of time. The time period is programmable from between 3 and 60 seconds. A typical setting is 10 seconds. The player is prompted to daub and must touch the screen or a mechanical button on the Game Terminal.

If the player daubs in time, the daubed numbers are marked in red on their bingo card. If the player sleeps the release (by not daubing within the allotted time), the numbers are marked in dark gray. Only numbers successfully daubed are eligible for completing any pattern (interim or game winning). While the player still has the opportunity to daub

numbers in subsequent releases, s/he cannot win any prizes that may have been awarded for patterns covered in a slept release.

After the first daub (or sleep), the Central Server draws the next set of numbers (*Release #2*) which consists of exactly the number of balls required for the first potential player to achieve the game winning pattern. The numbers in this release are determined in real time and transmitted from the Central Server to all Game Terminals that have joined into that game and are displayed on the flash board of each Game Terminal in the order that the balls were drawn. No additional balls are called unless the game winning player sleeps the bingo. The minimum number of balls in the second release is 23 because the first release is 2 balls and it takes 25 to achieve the coverall bingo game winning pattern. The maximum number in the second release is 73 (this would only occur if there were multiple players all waiting on the 73rd ball to coverall).

Once again the player will be required to daub (claim) by touching the screen or pressing a mechanical button within the allotted time (3 – 60 seconds, typically 10 seconds). If the player daubs in time, the previously released numbers are daubed in red on their bingo card. Just as in the first daub, if the player sleeps the release, the numbers are marked in dark grey and only numbers successfully daubed are eligible for completing any pattern (interim or game winning). In the event that any player sleeps any bingo, the game will notify the player of the slept bingo and prize that was forfeited.

If the player with the potential game winning pattern daubs the numbers within the time allotted, the game will be declared over, and the player will be awarded the game ending pattern prize plus any interim prizes (based on the first 24 balls called.)

During the ball call (from initial release to final claiming daub), the alternate graphics display will be in motion and not displaying any results. Only after the game has been declared over will the animation stop and the bingo pattern result be displayed on the alternate graphics or bonus round alternate graphics.

All players, regardless of patterns achieved must daub to claim prizes (even if they don't have any winning patterns). If the first potential game winner fails to daub in time, additional balls will be released until the second potential winner has the game winning pattern. Again, all players must daub. Balls are marked as above (Red = daubed in time, dark Gray = slept, Green = interim prizes), and the game continues in this fashion until there is only one possible winner remaining. The last potential winner **MUST** daub and has an indefinite period of time to daub. Any previous potential winner that sleeps the game winning pattern is released from the game and may join another game.

After the game is over, the highest winning pattern from the first 24 balls called is highlighted in green. The video reels stop spinning in symbol patterns matched to reflect the winning intermediate patterns matched on the bingo card. Every time the bingo card does not yield a winning pattern, the reels on the screen will spin to a non-winning

combination. If the bingo card does display a winning pattern, a specific winning combination will be displayed on the reels. The status bar alerts the player if s/he has won bingo, and if so displays the monetary prizes won. Finally the results of the game are transmitted to the Central Server. The player is then prompted once again to place their bet and hit 'PLAY' to play.

If a player has won the game-ending pattern, which is COVERALL prize, s/he must daub their card in the allotted time or the player will forfeit the COVERALL prize.

When a player decides to stop playing, they must cash out. If a player inserted cash at the start of play, then the player presses the cash out button, a ticket is printed and dropped into the tray. The player then takes this ticket to the Point-of-Sale terminal where the cashier either enters the ticket number manually or scans the bar code on the ticket. The cashier then gives the player the appropriate amount of money. Once this ticket is cashed out it is invalid and future attempts to cash out the ticket will cause the following message: "Cash Out Ticket Failed: Ticket has already been cashed out." If a player inserted a player's card for play, the player simply removes the card to end their session. The player may then take their card to the Point-of-Sale terminal to cash out or deposit money. Also they may simply keep their cards with remaining funds for future use. Cards remain active even if there isn't any credit remaining.

Payout and Video Display Information

Game Play is as described above. Once the game is declared to be over, the system evaluates the numbers marked on the player's card and compares these to the list of common patterns that are played for regardless of game theme or wager. This common pattern list is sorted from highest paying to lowest paying. The common pattern set is stored in the pattern table of the Central Server database. The Central Server begins at the top of the list and sees if the player achieved the given pattern. If a pattern match occurs, then the player will win the associated credit amount and the Central Server exits the pattern match routines. If a match does not occur, then the Central Server advances to the next pattern in the list and attempts a pattern match. This processing continues until the Central Server finds a pattern match or the end of the pattern list is reached.

Applicable Law

The Indian Gaming Regulatory Act (IGRA) governs gaming on Indian lands. The IGRA defines class II gaming in relevant part to include:

- (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
 - (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

- (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
- (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo[.]

25 U.S.C. § 2703(7)(A). Games that are not within the definition of class II games are class III. *See* 25 U.S.C. § 2703(8).

NIGC regulations similarly define class II gaming to include:

(a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:

- (1) Play for prizes with cards bearing numbers or other designations;
- (2) Cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
- (3) Win the game by being the first person to cover a designated pattern on such card;

(b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo[.]

25 C.F.R. § 502.3.

IGRA provides that class II games may utilize “electronic, computer or other technologic aids.” 25 U.S.C. § 2703(7). NIGC regulations define a technologic aid as “any machine or device that: (1) assists a player or the playing of a game; (2) is not an electronic or electromechanical facsimile; and (3) is operated in accordance with applicable Federal communications law.” 25 C.F.R. § 502.7(a).

In short, if a game contains the fundamental characteristics of a class II game and is played using an electronic or other technologic device, the determining factor in its classification is whether the electronic device is an aid to the play of a game, in which case the game is class II, or whether the electronic device is a facsimile of a game, in which case the game is class III. A game’s classification matters in that, under IGRA, class III games may be played only pursuant to a tribal-state compact. *See* 25 U.S.C. § 2710(d)(1)(C).

Analysis

The requirements for class II gaming are established by the IGRA. The game of bingo enjoys a favored status. While at its heart the bingo is a lottery, IGRA places the game squarely in class II and provides further that the game may be played with computer, electronic or other technologic aids. 25 U.S.C. § 2703(7)(A).

The United States Court of Appeals for the Ninth Circuit examined the IGRA requirements for bingo in its consideration of an electronic bingo game known as “MegaMania.” *U.S. v. 103 Gambling Devices*, 223 F.3d 1091 (9th Cir, 2000). A similar case in the Tenth Circuit, *U.S. v. 162 Gambling Devices*, 231 F.3d 713 (10th Cir. 2000) also evaluated “MegaMania” under the relevant IGRA provisions. Both courts concluded that the MegaMania game could be offered as a Class II gaming activity, the Ninth Circuit holding “IGRA’s three explicit criteria...constitute the *sole* legal requirements for a game to count as class II bingo.” *103 Electronic Gambling Devices*, 223 F.3d at 1096 (emphasis in original).⁴ It is against the backdrop of IGRA, NIGC regulations, and these cases that we must evaluate the Nova Bingo System game.

A. Statutory Criteria for Bingo

1. Cards Bearing Numbers

The first statutory criterion for bingo is that the game be played for prizes “with cards bearing numbers or other designations.” 25 U.S.C. 2703(7)(A)(i)(I). There is no statutory requirement that bingo be played with paper cards as in a traditional bingo game. In fact, case law and NIGC’s regulations provide that class II bingo games may be played with electronic cards. The U.S. Court of Appeals for the Tenth Circuit, in *U.S. v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000) ruled that a game, Megamania, was class II because it met the three statutory criteria for bingo, among them, that the game “is played with an electronic card that looks like a regular paper bingo card containing a grid of numbers....” *Id.* at 719. The Ninth Circuit also affirmed the class II status of Megamania, observing that the game consisted of “electronic game

⁴In the Ninth Circuit, MegaMania was found to be the game of bingo. See *103 Electronic Gambling Devices*, 223 F.3d at 1102. However, in the Tenth Circuit, the Court did not reach that specific conclusion. “Having determined MegaMania is a Class II game, we see no reason to go any further, and leave the specific question whether MegaMania is bingo or a “game similar to bingo” for future resolution.” *162 MegaMania Gambling Devices*, 231 F.3d at 725, fn 10. Games similar to bingo may be class II only if played in locations where bingo games are played. 25 U.S.C. § 2703(a)(A)(i). With a recent change, “games similar to bingo” are now defined by Commission regulation as “any game played in the same location as bingo (as defined in 25 U.S.C. 2703(7)(A)(i)) constituting a variant on the game of bingo, provided such game is not house banked and permits players to compete against each other for a common prize or prizes.” 25 C.F.R. § 502.8.

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‘cards.’” *U.S. v. 103 Electronic Gambling Devices*, 223 F. 3d 1091, 1093 (10th Cir. 2000). NIGC’s regulation on technologic aids, 25 C.F.R. § 502.7(c), explicitly names “electronic cards for participants in bingo games” as an example of an aid, which is allowable for class II games under 25 C.F.R. §502.3(a).

It can thus be said that the Nova System is played with cards in that the game is played with electronic bingo cards. These are bona fide cards in that they are readily visible, with dimensions of 2.5 inches by 2.5 inches, have high color contrast among the screen, the grid, and numbers within the grid, and are in an easy-to-read 26-point font.

The fact that the electronic card is readily visible and is integral to the play of the game is critical to our opinion that the Nova System meets the first statutory criterion. We do not consider the mere existence of an electronic card on a screen to meet the criterion. The game must be played on the cards, and the results of the game apparent on the cards, independent of the spinning wheels or other pattern. Part of the integral role that the bingo card plays in the case of the Nova System is that the bingo format of the game drives the spinning wheels display. That is, the numbers that are drawn and the patterns they form are what determine the patterns that the spinning wheels take. It is also important that the card is readily visible and that a player is able to discern what prize, if any, has been won by seeing the pattern on the bingo card.

2. Holder of the Card Covers When Objects Are Drawn

The second statutory requirement is that “the holder of the card covers” the numbers on the card “when objects...are drawn or electronically determined....” 25 U.S.C. § 2703(7)(A)(i)(II). The Nova Bingo System meets this requirement.

We note that the Act requires that the “holder” of the card, not just the possessor of a winning pattern, must cover the numbers when they are drawn. For this reason, it is important that all players, not just the winners, have the opportunity to daub when balls are released.

Also, as we have noted in previous opinions, IGRA requires that a player cover “when” objects are drawn. Webster’s Collegiate Dictionary (10th ed.) defines the conjunction “when” as: 1a: at or during the time that: WHILE...b: just at the moment that...c: at any or every time that...2: in the event that: IF...3a: considering that...b: in spite of the fact that: ALTHOUGH...4: the time or occasion at or in which....

The Nova System meets the requirement that a player cover when objects are drawn in that numbers are not stored on the game’s computer. Instead, numbers are released sequentially and displayed in the order released and players all have the same opportunity to cover (or daub) immediately upon release of drawn balls. Players purchase their cards before numbers are generated. Once numbers are generated, players are cued to daub

their cards. As in paper bingo, players cover in response to the numbers being drawn that correspond to numbers on their cards.

3. Game Won by First Person Covering Previously Designated Pattern

The third statutory requirement of bingo is that the game must be won by the first person covering a previously designated arrangement of numbers or designations on such cards. 25 U.S.C. § 2703(7)(A)(i)(III). The Nova System meets this criterion because the first person who covers the pre-designated interim pattern wins the prize associated with that pattern, and the person who first daubs the game-ending pattern wins the prize given for ending the game.

The Nova System also meets the requirements that the person actually cover the pre-designated pattern. This requirement would not be met if players could, in one motion, start the game, win, and claim their prizes. Bingo requires participation of some degree. Merely hitting a start button and having numbers covered would not comply with the degree of participation that the statutory language—"the first person to cover"—implies. Likewise, a totally automatic daub, in which the player need not have any response to the numbers that are called, would not be acceptable.⁵ The statutory criterion is met in The Nova System because, after initiating play, players cover their numbers by hitting the daub button on the game's hardware after each release.

We can conclude that The Nova System meets the third statutory criterion also because the game requires there to be at least two releases of numbers before a winning game-ending pattern is created. The statutory language, "won by the first person," describes a contest or race among players to be the first to win. Central to "the game of chance commonly known as bingo" is the competition built up over the course of successive ball draws, as each player covers matching numbers or designations in an attempt to be the first to cover the winning pattern.⁶ No such challenge exists where all of the balls are revealed at once. Said differently, if all the balls necessary to produce a game-winning pattern are drawn at once, the game will likely end with only one ball draw, thereby removing the contest element.

Our interpretation of the statutory definition, requiring balls to be released in multiple rounds during the course of the game, is supported by case law. In the Ninth and Tenth circuits' opinions on MegaMania, the courts found that the game was Class II. *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *U.S. v. 162 MegaMania*

⁵ An automatic daub in the context of this type of game would not qualify as an aid as it would play the game for the player rather than assist the player.

⁶ This conclusion that Congress and the Commission intended class II bingo to be a competition with or against other players is also key to the distinction between class III facsimiles of a game, in which players play against a machine, and class II bingo aids, in which players play against each other.

Gambling Devices, 231 F.3d 713 (10th Cir. 2000).⁷ The courts reached their decisions after an analysis of the play of the game and whether it met the statutory criteria for bingo. According to the courts, in MegaMania numbers are drawn by a bingo blower and released three balls at a time. If a player wants to continue playing the game after the first three balls are drawn, the player pays additional money to stay in the game for the release of the next three balls. The game is won by the first person to cover a five-space straight line on an electronic bingo card.

Intrinsic to the play of MegaMania are the successive rounds that a player must engage in to win the game. The game cannot be won after a single ball release. The Ninth Circuit's ruling—limited as it was to the facts—recognizes an inherent character of bingo: that the game requires a player to participate in a process of numbers being revealed. MegaMania could be won by two successive ball draws and so we do not require more than two ball releases to reach the first pattern. But we do interpret IGRA's definition of bingo, with the winner being the first to cover, as requiring more than one release. Consequently, the number of balls released on the first ball draw must be some number less than the number of balls required for a player to achieve the win, that is, the game-ending pattern.

Our interpretation of the third statutory criterion is consistent with both case law and the statutory definition, and also honors what we understand “the game of chance commonly known as bingo” should be. See 25 U.S.C. 2703(7)(A)(i). We are wholly cognizant of the Ninth Circuit's caveat that “Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhood or home towns might discover, IGRA's three explicit criteria constitute the sole legal requirements for the game to count as class II bingo.” *103 Electronic Gambling Devices*, 223 F.3d at 1096. We are also aware that the lines between what constitute class II and class III games are being blurred by technological advances that Congress could not have foreseen and did not explicitly address in 1988 when it enacted IGRA, with its three simple statutory criteria for what constituted bingo. We nonetheless must continue to distinguish class II from class III games because Congress distinguished between them.⁸ The Committee Report on the bill that became IGRA noted, “both State and tribal governments have significant governmental interests in the conduct of class III gaming.” S. Rep. 100-446, p. 13. Having weighed the merits of different interpretations of the third statutory criterion, we find that requiring multiple ball releases is in keeping with the statutory language, case law, and with our concern that play of bingo must be distinguishable from the play of a slot machine, over which Congress intended tribes and states to compact.

⁷ The Ninth Circuit specifically found that MegaMania was bingo. The Tenth Circuit was not so specific: “Having determined MegaMania is a Class II game, we see no reason to go any further, and leave the specific question whether MegaMania is bingo or a ‘game similar to bingo’ for future resolution.” *162 MegaMania Gambling Devices*, 231 F.3d at 725, n.10.

⁸ The NIGC is in the process of developing regulations to better explain the definitional differences between class II and class III gaming aids and devices.

The requirement that the first person to cover wins is also met by the Nova System's provision that allows the game to continue if a player sleeps his game-winning bingo. Similarly, if a player fails to daub when he or she has one of the other pre-designated patterns that yield interim prizes, that player will forfeit the prize. Not allowing a player to sleep results in a game in which no one has to cover; the game would simply end, either with no one winning or with a person winning who has not had to cover. In the Nova System, if the winning player fails to daub the game-winning pattern, the player forfeits his prize and the game continues, with more numbers being revealed, until a player does cover the pre-designated game-winning pattern.

B. Electronic Aid v. Facsimile

In addition to meeting the requirements for bingo, a game can be class II so long as it includes an electronic aid and is not an electronic or electromechanical facsimile. 25 C.F.R. § 502.7(a). NIGC's regulations define an electronic, computer or other technologic aid as:

(a) Electronic, computer or other technologic aid means any machine or device that:

- (1) Assists a player or the playing of a game;
- (2) Is not an electronic or electromechanical facsimile; and
- (3) Is operated in accordance with applicable Federal

communications law.

(b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

- (1) Broaden the participation levels in a common game;
- (2) Facilitate communication between and among gaming sites; or
- (3) Allow a player to play a game with or against other players rather than with or against a machine.

(c) Examples of electronic, computer or other technologic aids include pull-tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.

25 C.F.R. § 502.7.

NIGC regulations define electronic or electromechanical facsimile as follows:

Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or

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electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. §502.8. The electronic characteristics of the Nova System fall into the category of electronic aid.

First the Player Terminals on which the game may be played are linked in two ways. One, they are linked within the gaming operation so that players compete against each other in one location. Two, games may be linked through the central system, enabling players from different gaming operations or different reservations to compete against each other. The game may be played with as few as two (2) players. As noted in the game description, above, the system waits anywhere from 2-10 seconds for additional players to log in, based on a mathematical algorithm that varies the enrollment period based on the number of active terminals in play on the system. With fewer terminals active, the algorithm lengthens the enrollment period to accommodate more players and thus broaden the participation.⁹ These characteristics meet the definition of electronic aid, in that they “broaden the participation levels in a common game”—that is, a single game—facilitate communication between gaming sites, and allow players to play against other players. 25 C.F.R. §502.7(b)(1), (2), (3).

We note that, as previously configured, higher bettors had more available interim patterns and thus more potential opportunity to win. Since players were not competing for the same patterns they were not playing the same game. Consequently, we required that Nova revise the Nova System such that all players, regardless of buy-in level, play for the same interim (as well as game-ending) patterns. (Prizes, however, may be awarded based on buy-in level.) Nova made the changes, as previously discussed.

In addition, participation among players, rather than against the machine, is encouraged by the successive ball releases and daubing requirements. By requiring players to participate and actually play the game, rather than simply start the game and complete it in one ball release, the Nova System broadens participation as well as requiring the player to play against other participants rather than just against the machine.

In short, the Nova System is not a facsimile. It may therefore be classified as class II.

Conclusion

Based on our review, we conclude that the Nova Bingo System qualifies as bingo, as that term is used in IGRA and as defined by NIGC regulations, and is a Class II game. The particular version of the game to which this opinion applies is 4.2.0.12. This opinion

⁹ A specific description of the algorithm is not included in this opinion because it is considered confidential proprietary information.

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does not apply if the game is modified, if additional features are added, or if played in a manner different from the manner described in this opinion. The features discussed in this opinion, along with the manner and sequence of events in game play and the minimum timeframes described, are integral to our opinion. Furthermore, the NIGC is in the process of developing regulations further interpreting the statutory criteria of bingo. Consequently, when those regulations are final our views on the classification of this game may be revised.

Please address any questions about this opinion to the undersigned or to Maria Getoff in the NIGC Office of General Counsel.

Sincerely,



Penny J. Coleman
Acting General Counsel

cc: NIGC Region Chiefs for distribution to tribes

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