October 18, 2004

Joseph H. Webster, Esq.
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, NW, Suite 700
Washington, DC 20037

Subject: Rocket FastPlay Bingo 1.0 Advisory Opinion

Dear Mr. Webster:

You requested an advisory opinion on whether Rocket FastPlay Bingo 1.0 (FastPlay).
developed by Miami Tribe of Oklahoma Business Development Authority (MBDA) 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 FastPlay qualifies as bingo, as that term is used in
IGRA and as defined by NIGC regulations, and is a Class II game. 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, are integral to our
opinion. Furthermore, the NIGC is in the process of developing regulations further
interpreting the statutory criteria of bingo. Consequently, when final, our views on the
classification of this game may be revised.

By letter dated January 22, 2004, we advised MBDA that we would require the
submission of a laboratory report that evaluates the games operating system and software
and confirms that the FastPlay game operates in the manner described in this opinion. On
June 16, 2004, we received a copy of a laboratory report issued by Nick Farley &
Associates. This report confirms the operational characteristics of the game. On June 30,
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 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 August 6, 2004, you
provided us with a proposed modification to rectify this issue. You proposed to revise
the game to only allow players to play in a common game when those players are playing
for the same set of interim and game ending patterns. On September 14, 2004, we
observed a live demonstration of the game at Cherokee, North Carolina, and on

September 15, 2004, Nick Farley & Associates verified that this modification was made to the game.

Description of the Rocket FastPlay System

Mechanics of the Game

FastPlay is a linked bingo system played within a gaming facility and/or among gaming facilities by players utilizing Electronic Player Stations (EPS). The computer program that facilitates play of the gaming within a facility, the Local Game Controller (LGC), determines whether or not a game has sufficient players to be played locally. If it does not, the requests to play are passed to the Network Game Controller (NGC), which collects game requests from each LGC. The NGC will then start the game when the game start criteria are met. If enough players exist locally to start a game, the LGC will coordinate the play of the game.

The game also utilizes what is called a Bank Controller (BC). The BC is a software process that coordinates activity between EPSs and the other software processes within the network in a gaming facility. During the time a player is logged onto an EPS, the BC provides accounting services in addition to coordinating game play functions between the EPSs and the LGC.

The Rocket FastPlay game offers progressive prizes both locally and network-wide. The Network Progressive Prize Controller (NPPC) manages the prize pools. As players participate in games, the BC informs the LPPC of the sales figure for each game. The LPPC determines whether the game offers local or network progressive prizes. If the game played is a local progressive, the LPPC will accumulate a portion of the game sales to the progressive prize value for that game. If the game provides a network progressive prize, the LPPC will forward sales data to the NPPC. Players will always be informed of the value of the progressive prize.

The game utilizes one card perm. The card perm algorithm is located at the Network Game Controller, Local Game Controller, Bank Controller and EPS. The Card perm contains all possible bingo card permutations given the orientation of numbers available on the card.

The cards in the card perm are divided into sets of cards. Each EPS on the network is assigned a unique set from available sets of cards in the Card Perm. The first time a player logs in to the EPS, the EPS will randomly select a card from the set of available cards.

Game Play

To play games on the Rocket FastPlay system, players must obtain a player account. Player accounts may be obtained either at the Electronic Player Station, Point of Sale (POS), Automatic Cash Attendant (ACA) or Portable Point of Sale (PPOS), depending on the configuration of the system in the facility. If the facility requires the player to obtain the player account at the POS, ACA or PPOS the facility may issue a Magnetic Card, Smart Card or Paper Receipt to the player. If the facility requires the player to obtain the player account at the EPS, the EPS will issue an account to the player upon insertion of money into the EPS and will issue a paper ticket to the player representing the account upon cash out of the player from the EPS.

Depending on the configuration of the system at the facility, the player account is activated at the EPS by either swiping or inserting a Magnetic Card or Smart Card, manually entering the account number from a Paper Receipt, inserting a paper ticket or inserting money (in which case an account number is assigned).

Once the account is validated at the EPS, any funds on the account become available at the EPS and the player may proceed to select a game to play.

Depending on configuration, the EPS may offer one or multiple games for play by the player. The games offered may be the same bingo game with different entertainment displays (skins). The game demonstration we viewed in our office was the Wild Turkey theme game. We understand that other themes may be utilized, but that the game functions will stay the same. In addition, we were advised that the prize tables and game patterns presented were preliminary and that patterns and prizes used in final themes of the game may change, but that the implementation and methods used to determine payout of pattern prizes will remain the same. We understand this to mean that the graduated nature of the prize structure will not change.

Once the player has selected the game to play, the player will select a denomination. Depending on configuration, the EPS may offer one or multiple denominations for a game. Each denomination may also have one or more selections representing different prize pools. For example, a game may offer denominations of 1 cent, 5 cents and 10 cents. For each denomination the game may also offer a selection of a local, regional or national prize pool. The selection of the prize pool would determine the value of prizes such as progressives.

The selection of the denomination also establishes the value of a credit in the game. Player prizes and wagers are represented in credits. For example, covering a particular pattern in a game may result in the player being paid a 100-credit prize. If a player were playing the 1-cent denomination, this would result in the player winning $1.00, for the 5-cent game, $5.00, and for the 10-cent game, $10.00.

The game display will consist of an area of the screen dedicated to the display of the bingo game, a display(s) for depicting the results of the bingo game in an entertaining

format, controls to allow the user to interact with the game and its functions, and additional screens for detailing game rules, help on play, prize tables and bingo patterns.

The bingo display will consist of a bingo card, an area to display balls drawn, a game number, and a status area to inform the player of various stages during the game. The bingo display area will be located on the top of the screen. In the Wild Turkey game the bingo display area is located on the top left of the screen.

The bingo display consists of a standard 5x5 bingo card no smaller than 2 inches x 2 inches on the display device. The bingo card is displayed with black number on a white background in Arial font 26 point bold. The 5 columns of the bingo card are labeled B, I, N,G and O. Within each column of the card are displayed 5 of 15 available numbers. In the B column, 5 numbers from 1-15 are displayed, in the I column 5 numbers from 16-30, in the N column, 5 numbers from 31-45, in the G column, 5 numbers from 46-60 and in the O column 5 numbers from 61-75.

In the Wild Turkey game version, the winning game-ending pattern is a 5 spot "P" pattern. The "P" pattern has 4 possible locations on the 5x5 bingo card. The value of the prize awarded will be dependent on both the number of balls called to obtain the pattern and which location(s) of the pattern were covered.

The entertaining displays will consist of primary and secondary displays that provide an entertaining addition to the display of the bingo card. Possible primary alternative displays that could portray the bingo card results would be:

- Spinning Reel displays with one or more pay lines.
- U-Pick-Em Style Card Games.
- Poker Displays.

Possible secondary alternative displays that could portray the bingo card results would be:

- Spinning Wheel Games
- Racing Games
- Selection Games
- Pachinko Games
- Bonus Meters
- Bingo Meters

In all cases, whether the primary or secondary alternative display is used, the prize won on the bingo card will solely determine the depiction on these displays.

All Rocket FastPlay games will offer a set of screens that display to the user the prizes available to be won. The screens offered will display to the player the patterns and

associated prizes at each available buy-in level for the bingo game, in addition to a display showing the entertaining display depictions that may be shown for prizes won. The player may change their bingo card as many times as they desire prior to joining each game. Each time the player changes their card, the EPS will randomly select a new card from the set of cards available at the EPS.

Only the player, via the selection function on the EPS, determines the card that will be played at the EPS. The card played by the player will be unique across the game network.

In addition to changing their bingo card, players may choose the buy in level at which they wish to play. Selecting a buy in level determines the level of prizes awarded for the interim and game-ending patterns. Regardless of buy in level, all players in the game will play for the same interim and game-ending pattern.

The value of the prize awarded to the player(s) that cover the game ending pattern will be dependent on both the number of balls called to obtain the pattern and also which rotation(s) of the pattern were covered. In addition to a fixed prize for obtaining a game ending pattern, a player may win a progressive prize based on achieving the pattern in a unique combination defined by the rules of the game.

Future game themes might use a game-ending pattern other than the "P". Other examples of game ending patterns that may be used would be a Straight Line (5 spots, 12 different rotations) or a Block of 6 (6 spots, 24 different rotations).

Interim prizes are awarded to the player based on covering a predetermined pattern other than the game-ending pattern. Like the game ending pattern, interim pattern prize values are awarded based on the number of balls called to obtain the pattern and which rotation(s) of the pattern were covered. The prizes offered for obtaining the game-ending pattern may be fixed or progressive as with the prize for obtaining the game-ending pattern. It is possible that a player covering a game-ending pattern may also have covered an interim pattern. In the event that the player has covered multiple patterns, the player will be deemed to cover both patterns, but will only be awarded the prize value of the highest covered pattern.

Progressive prizes may be offered for interim and game ending patterns. All game plays are recorded by LPPC and NPPC. The LPPC and NPPC determine which progressive prizes a particular buy-in level contributes to and allocates a percentage of the buy-in towards the growth of the progressive prizes associated with the game. Progressive prizes managed by the LPPC and NPPC grow in value until such time as a player covers a predetermined pattern associated with the progressive prize. The player covering the predetermined pattern is awarded the value of the progressive prize at the time the win is claimed based on achieving the pattern in a specified minimum number of balls. 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.

Once players have selected their bingo card and buy-in level, they may request to join the game by pressing the appropriate action button on the EPS. In the Wild Turkey demo theme example, the action button to join a game is the <PLAY> button or the <MAXBET> button which requests to join a game at the maximum buy-in level.

The requests to join the game are collected by the BC for a group of EPSs in the facility and forwarded to the Local Game Controller (LGC) play queue. The LGC will periodically examine the number of join game requests that it has queued. If the LGC determines that it can start a game with the players available, it will proceed with starting the game.

If the LGC does not have enough players to start the game, but there is a high probability that additional players will join the game within a reasonable time frame, it will wait for additional players to join the game. The system waits anywhere from 1-10 seconds for additional players to join based on a mathematical algorithm that varies the enrollment period based on the number of active terminals.

If the LGC does not have enough players to start the game, and the probability of additional players joining the game is low, the LGC will forward the play requests to the NGC. A minimum of two players is required before a game may commence.

Play requests forwarded to the NGC are queued at the NGC until a game can be started or until a predefined period has elapsed. If the predefined join game period elapses, the players that requested to join a game will be refunded their game purchase.

Upon starting a new game the LGC (or NGC if players have been forwarded to the NGC) will draw the first set of numbers. Numbers are drawn from a set of 75 numbers (1-75). A certified random number generator located at the NGC/LGC determines the numbers. The numbers will be transmitted from the LGC to all EPSs that have joined into the game and displayed on each EPS in the order that they were drawn.

The number of balls drawn in the first set will be one less than the number of balls required to cover the game ending pattern. In the Wild Turkey example, the game-ending pattern is a 5 spot "P" pattern; therefore the number of balls drawn in the first set of numbers is 4.

Once the balls have been displayed to the player, the player will be required to daub the numbers within a predetermined period of time. The time period is programmable from between 2 and 10 seconds. It is our understanding the time period will be set at 3 seconds. [1] The player will be required to touch a mechanical button on the EPS or a predefined area of the screen to daub the drawn numbers.

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[1] The latest draft of NIGC classification regulations requires at least a two second time period for daubing. While we understand that the Fastplay game will be set at 3 seconds, we recognize that MBDA may use any time period between 2 and 10 seconds.

If the player does not daub the first set of numbers in the allotted time, s/he will have slept those numbers. While the player still has the opportunity to daub the numbers following subsequent ball draws, s/he cannot claim prizes that may have been awarded for patterns covered in the first set of balls drawn. Since the number of balls drawn in the first set is one less than that number required for the game ending pattern, the only patterns that could be slept by the player are interim.

Once the first daub period has expired, a second set of balls is drawn by the NGC/LGC. The numbers are transmitted to all EPSs joined into the game and presented on the EPS display in the order that they were drawn.

The NGC/LGC will draw the number of balls required for the next potential winner of the game-ending pattern.

In the Wild Turkey example, the average number of balls drawn in the second set of balls would be 17 (for a total average of 20 balls) with 15 players in the game.

Once the second set of balls has been displayed to the player, the player will be required to daub the numbers within a predetermined period of time. Again, this time period is programmable from between 2 and 10 seconds and will be set at 3 seconds. The player will be required to touch a mechanical button on the EPS or a predefined area of the screen to daub the drawn numbers.

If the player with the potential game ending pattern daubs the numbers within the time allotted, the game will be declared over, and the player will be awarded a value of prize as indicated in the prize tables based on the buy-in level, number of balls used and, possibly, the rotation of the game ending pattern.

Besides highlighting the winning pattern on the bingo card with red daubs, one or a combination of the alternate displays available will also display wins representative of the prize value won by the player. In the example of Wild Turkey, the spinning reels may stop and show a combination of symbols on one or more pay lines that represent the prize value won on the bingo card. In addition to or in combination with the reel display, prizes also may be shown using a re-spin feature (as long as it does not change the amount of the prize won by the player), bingo meters, or bonus meters.

Players other than the game winner must also daub their numbers in the time allotted to cover any available interim patterns. If the game has been declared over due to a player covering the game-ending pattern, players who covered interim patterns prior to the end of the game will be paid prizes associated with those patterns. As with the game-ending pattern, the interim patterns will be highlighted with red daubs on the bingo card, and the alternate display will show a result representative of the prize value won.

Whether winning a game-ending or interim pattern, the alternative display will not show representative results of the game prior to the bingo display.

Any player who does not daub the second set of numbers in the time allotted will be deemed to have slept any patterns and prizes they may have been awarded.

In the event that a player sleeps a bingo in the 1st, 2nd or subsequent ball draw periods, the game will notify the player of the slept bingo and prize value that was forfeited as a result of their inaction (not daubing).

If the player does not daub the second set of numbers in the allotted time, s/he will have slept those numbers. While the player still has the opportunity to daub the numbers on subsequent ball draws, s/he cannot claim a bingo for patterns that may have been covered in the second set of balls drawn. If the player who had the potential game-ending pattern did not daub in the time allotted, the game will continue and the pattern slept by the first potential winner will lock in the value of the game-winning prize (based on the applicable pay-table).

If a player sleeps the second set of balls, and the game has ended (due to the game ending pattern being covered by another player), the game will show no prizes being awarded to the player. Any alternate display utilized in the game will display a result showing no wins. In the example of Wild Turkey the reels would stop showing no winning combinations on the pay lines.

If the player who had the potential game-ending pattern in the second ball draw has slept the win, the game will continue. The NGC/LGC will draw the number of balls required for the next potential winner of the game-ending pattern.

Like the second ball draw, the NGC/LGC will transmit the drawn balls to the EPS joined into the game and the numbers will be displayed in the order they were drawn on the EPS. Players will have 3 seconds to daub the numbers on their bingo card. Like the second ball draw, if the winning player daubs the balls, the game will be declared over. If the winning player does not daub the balls in the time allotted, the game will continue to draw another set of balls as required for the next potential winner.

The game will continue the process of additional ball draws as necessary until such time as a player covers the game ending pattern by daubing the numbers in the time allotted, or until the NGC/LGC has determined that no further bingo patterns may be covered.

Once the game has been declared over, players who daub in the time allotted will be awarded prizes as described in the second ball draw case. The player who covers the game-ending pattern to win the game will be awarded the prize value that would have been won by the first potential winner of the game.

The NGC/LGC may determine that the current ball draw represents the last possible opportunity for a player in the game to cover a game-ending pattern. In this case, the game will be declared over and any other players will be allowed to exit the game.

The EPS with the last possible game-ending pattern will hold the daub period active indefinitely and require the final player to daub the balls and be awarded the game-ending prize.

As with the second ball set, the prize awarded to the player will be based on the number of balls required to cover the game ending pattern and possibly the rotation of the pattern as predetermined and described in the rules screens.

Each game may offer multiple buy-in levels (bingo card prices). For example, in Wild Turkey there are eight buy-in levels. The lowest buy-in level is 100 credits and the highest buy-in level is 1,800 credits. The buy-in levels are shown as "lines" on the entertaining reel display. With 1 line in play, the player plays at buy-in level 1 with 100 credits wagered (in other words, the price of the level 1 bingo card is 100 credits). With 2 lines in play, the player plays at buy-in level 2, with 200 credits wagered, and so on until level 8 (3 lines at 600 credits per line (1,800 total credits)).

Changing the buy-in level changes the value of the prize awarded for achieving a particular winning pattern. For example, at buy-in level 3, the game winning "P" pattern in the upper left hand corner will pay a prize of 70,000 credits if achieved within the first seven bingo numbers, while at buy-in level 4 the pattern will pay 140,000 credits if achieved within the first seven bingo numbers. However, in all cases all players are playing for the same set of winning patterns.

The change in buy-in level does not increase the player's chance of actually covering interim or game winning patterns. All rotations of the game winning pattern (a 5 spot "P" pattern) and all interim patterns are in play at all buy-in levels. What changes between buy-in levels 1-8 is the potential value of the prize that a player can win by covering a pattern. Generally, a higher buy-in level results in a higher value prize without change to the odds of winning.

For example, with Wild Turkey, if the player has wagered 300 credits (as represented by 3 lines on the entertaining display) the top award is 400,000 credits. If the player proceeds to buy-in level 4, they double the amount of their wager to 600 credits (instead of 100 credits for each of the three lines on the entertaining display, they are wagering 200 credits per line, for a total wager of 600 credits). The top award at the 600 credit wager level is 800,000 credits. The higher wager per line results in the multiplication of any prize paid by the number of credits wagered per line.

Applicable Law

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

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(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,[2] 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). A game "similar to bingo" may also be class II provided it is not an electronic facsimile of a game of chance and is not house-banked. 25 U.S.C. § 2703(7)(A)(III); 25 C.F.R. § 502.9.

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).[3] It is against the backdrop of IGRA, NIGC regulations, and these cases that we must evaluate FastPlay 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

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[2] "Bingo as we know it today is a form of lottery and a direct descendant of *Lo Giuoco del Lotto d'Italia*," the Italian national lottery first organized in 1530. Snowden, Gambling Times Guide to Bingo (1986), p. 7. See also Scarne, Scarne's New Complete Guide to Gambling (1986), p. 210.

[3] In 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.

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 '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 FastPlay Bingo 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 inchs by 2 inchs, 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 FastPlay Bingo 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 FastPlay 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). FastPlay 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....

FastPlay 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). FastPlay meets this criterion because the first person who covers one of several pre-designated patterns wins the prize associated with that pattern. The person who first daubs the game-ending pattern wins the prize given for ending the game.

The fact that the game allows for "interim" or "bonus" prizes by players other than the one with the game-ending pattern does not negate this finding. The U.S. Court of Appeals for the Ninth Circuit in *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000) makes clear that the third statutory requirement may be met even if prizes are won by players before there is a game winner:

> The sum of the matter is that the IGRA requirement that a "bingo" game be "won" by the "first player" covering a pre-designated pattern does not mean the game must *end* when one player does so, so that everyone else wins nothing.

Id. at 1098-1099. The court thus held that a game in which players won interim prizes before the game-ending prize was covered could be class II.

The Tenth Circuit has similarly held that

> nothing in the Gaming Act or [NIGC] regulations prohibits more than one winner or "interim prizes" during a game of bingo.

U.S. v. 162 Megamania Gambling Devices, 231 F. 3d 713, 722. Thus, the fact that the first person to cover a pre-designated pattern does not end the game does not foreclose a finding that the game is class II.

FastPlay 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,

an automatic daub, in which the player need not have any response to the numbers that are called, would not be acceptable.[4] The statutory criterion is met in FastPlay because, after initiating play, players cover their numbers by hitting the daub button on the game's hardware.

We can conclude that FastPlay 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.[5] 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 Gambling Devices*, 231 F. 3d 713 (10th Cir. 2000).[6] 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.

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[4] 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.

[5] 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.

[6] 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.

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. 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.[7] 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.

The requirement that the first person to cover wins is also met by FastPlay's provision that allows the game to continue if a player sleeps his bingo or fails to daub when he or she has one of the pre-designated patterns. 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 FastPlay, if the player fails to daub, the player forfeits his prize and the game continues, with more numbers being revealed, until a player does cover a pre-designated pattern.

An earlier version of FastPlay raised the issue of whether a game would be bingo if, on the second ball draw, all remaining balls were released. We determined that it could not because it would violate the "won by the first person to cover" requirement. Such a scenario would result in what we refer to as a "ball dump"; all remaining balls are released at once and players merely check their cards against the balls drawn to see if they won. Bingo requires more competition among players than would result from a "ball dump." Instead, we have determined that the second ball draw may release those balls required to achieve a win, but not all the remaining balls. This is how FastPlay is played, and results in the possibility that a player will "sleep" a bingo. The sleeper function allows that, if a player sleeps a bingo, more balls will be drawn until there is a

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[7] 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.

winner. No such scenario exists with a "ball dump" because there is no third or subsequent ball draw.

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 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 FastPlay fall into the category of electronic aid.

First the EPSs 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 1-10 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.[8] 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 are not competing for the same patterns they are not playing the same game. Consequently, we required MBDA to revise the game 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.) MBDA's solution to this problem is to group players together who are playing for a common set of both interim and game ending patterns. This is acceptable.

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, FastPlay broadens participation as well as requiring the player to play against other participants rather than just against the machine.

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

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

Sincerely yours,

Penny J. Coleman
Acting General Counsel

cc: NIGC Region Chiefs for distribution to tribes

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