October 21, 2005

John Pacconi
Progressive & Linked Gaming Systems
Atronic Americas, LLC
16537 North 92nd Street
Scottsdale, AZ 85260

Re: Review of wide area progressive system agreements;
Michigan Magic and Penny Arcade

Dear Mr. Pacconi:

On October 12, 2004, you wrote to the National Indian Gaming Commission ("NIGC"), on behalf of Atronic Americas, LLC ("Atronic"), seeking review of two wide area progressive agreements and a determination of whether they constitute management contracts under 25 U.S.C. § 2711. If the agreements are found to be management contracts, or collateral agreements to a management contract, then they require the NIGC Chairman's approval to be in compliance with the Indian Gaming Regulatory Act ("IGRA"). The agreements submitted to us are the Michigan Magic Progressive System Agreement ("Michigan Magic") and the Penny Parade Progressive System Agreement ("Penny Parade"). While the agreements appear to be generic (and were submitted to us unsigned), you have indicated that our review is in anticipation of the Bay Mills Indian Community ("Bay Mills" or "Tribe") entering into the agreements in connection with the operation of its Bay Mills Casino.

In a letter dated January 25, 2005, we asked that you provide us with additional information to assist us in our review. You responded in a letter dated February 5, 2005, with details about the accounting system utilized in connection with the progressive machines, including a copy of your accounting and procedures manual.

Although differing in minor respects, we view the two wide area progressive system agreements as essentially the same for purposes of this review. We have reviewed both of the agreements with two purposes in mind: first, as you requested in your initial letter, to determine whether the agreements are management contracts, or collateral agreements to management contracts; and, second, to determine whether the agreements give Atronic a proprietary interest in the gaming operation.

We find in the affirmative as to both inquiries. The agreements, on their face, give Atronic a proprietary interest in the Bay Mill Indian Community's gaming operation. The agreements also constitute management contracts, requiring the Chairman's approval.

Proprietary interest generally

Among IGRA's requirements for approval of tribal gaming ordinances is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 C.F.R. § 522.4(b)(1). Accordingly, the Bay Mills Indian Community's gaming ordinance, approved by the NIGC, requires that "the operations of the Tribal Commission be conducted on behalf of the Tribe for the sole benefit and interests of the Tribe. . . ." Gaming Ordinance Bay Mills Indian Community, Section 4.4. Further, the Tribe's gaming policy, as articulated in its gaming ordinance, is that gaming be "regulated and controlled by the Tribe pursuant to tribal and federal law. . . ." *Id.*, Section 1.3.

We first address what constitutes a "proprietary interest." The rules of statutory construction direct us to the plain language and the ordinary meaning of the words themselves. "Proprietary interest" is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights . . . ." An owner is defined as "one who has the right to possess, use and convey something." *Id.* "Appurtenant" is defined as "belonging to; accessory or incident to . . . ." *Id.* Reading the definitions together, a proprietary interest creates the right to possess, use and convey something.

Although there are no cases directly on point, courts have defined proprietary interest in a number of contexts. In a criminal tax case, an appellate court discussed what the phrase proprietary interest meant, after the trial court had been criticized for not defining it for jurors, saying:

> It is assumed that the jury gave the phrase its common, ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.' Certainly, the phrase is not so technical, nor ambiguous, as to require a specific definition.

Evans v. United States, 349 F.2d 653 (5th Cir. 1965). In another tax case, Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970), the issue was whether the plaintiff had a sufficient proprietary interest in a wagering establishment to be liable for taxes assessed against persons engaged in the business of accepting wagers. The court observed:

> It is not necessary that a partnership exist. It is only necessary that a plaintiff have some proprietary interest. . .

> *One would have a proprietary interest if he were sharing in or deriving profit from the club* as opposed to being a salaried employee merely performing clerical and ministerial duties. [emphasis added]

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of the IGRA with respect to "proprietary interest" is scant, offering only a statement that "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. "Enterprise" is defined as "a business venture or undertaking" in Black's Law Dictionary, 7th Edition (1999). Despite the brevity of this information, the drafters' concept of "proprietary interest" appears to be consistent with the ordinary definition of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Finally, and important for this analysis, in the preamble to IGRA's implementing regulations, the NIGC provides specific examples of what sole proprietary violations might look like. One such example reads as follows:

> An agreement whereby consideration is paid or payable to the gaming operation *for the right to place gambling devices that are controlled by the vendor in such gaming operation* is inconsistent with the requirement that a tribe have the sole proprietary interest. [emphasis added]

58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

Proprietary interest analysis

The focus of our analysis is whether these agreements give the vendor, Atronic, a proprietary interest in the Bay Mills gaming operation in violation of IGRA, its implementing regulations and the Tribe's own gaming ordinance.

The arrangement anticipated by these agreements appears to be identical to the above example of a prohibited proprietary interest obtained by a vendor. We thus examine whether, under these agreements, Atronic will pay consideration to the Tribe for "the right to place gambling devices that are controlled" by them in the Bay Mills Casino.

Unlike the arrangement in many vendor agreements, the vendor in this instance

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1 page has been withheld in full pursuant to Exemption (b)(4).

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Both agreements have indicia of management control and activity, which further demonstrate that the Tribe does not retain its sole proprietary interest in its gaming operation under these agreements. Our primary concern is with the placement of the machines. According to the agreements,

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Because all gaming floors have their hot and cold spots, the floor space upon which a machine sits is important, and the power to situate a machine is not insignificant. Placement is a key factor as to how lucrative or productive a machine will be.

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These are fundamental management decisions.

Management contracts generally

We next examine the extent to which the agreements give control to Atronic over the Bay Mills gaming operation and create a management relationship between Atronic and the Tribe.

The NIGC, in its implementing regulations, has defined the term "management contract" to mean "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. "Gaming operation" is defined as "each economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses." 25 C.F.R. § 502.10. The NIGC has defined "collateral agreement" to mean "any contract, whether or not in writing, that is related either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5.

Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See NIGC Bulletin No. 94-5.* In the view of the NIGC, the performance of any one of these activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring NIGC approval.

Management contract analysis

Again, although differing in minor respects, we view the two wide area progressive system agreements as essentially the same for purposes of this review. We are concerned that the agreements give extensive control to Atronic over the Bay Mills gaming operation and create a management relationship between Atronic and the Tribe. Thus, for the same reasons that we have determined that these agreements deprive the Tribe of its sole proprietary interest in the gaming operation, we conclude that these agreements are management contracts.

Conclusion

We conclude that there are sufficient indicia of control and management activity to conclude that these agreements are management contracts requiring approval of the Chairman of the NIGC. We find that, by these agreements,

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Considered

together, all of these factors demonstrate that these agreements create a significant management relationship between the Tribe and Atronic. Under IGRA, a management contract is void if it has not been reviewed and approved by the Chairman of the NIGC pursuant to 25 U.S.C. §2711.

We further conclude that the agreements give a proprietary interest to Atronic in violation of IGRA, the implementing regulations and the Tribe's own gaming ordinance. While we find that the fee charged to the Tribe for participating in the progressive system is not necessarily excessive, it is high. We are concerned that [redacted]

[redacted] In summary, under the agreements, Atronic will [redacted] 64

[redacted]

If you have any questions, please feel free to contact Staff Attorney Katherine Zebell at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel