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December 15, 2006

Via Fax and First Class Mail

Hon. Philip Hogen, Chairman  
National Indian Gaming Commission  
1441 L St., N.W., Suite 9100  
Washington, D.C. 20005

Re: Comments on Economic Impact of Proposed Class II Classification Standards (71 Fed. Reg. 30,238 (May 25, 2006)), Proposed Electronic or Electromechanical Facsimile Definition (71 Fed. Reg. 30,232 (May 25, 2006)), and Proposed Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)); Comments on Proposed Alternative.

Dear Chairman Hogen:

Enclosed please find the comments of Bally Technologies, Inc. ("Bally") on the economic impact analysis conducted by the National Indian Gaming Commission's ("NIGC") on its proposed Class II classification standards, as well as supplemental comments on the NIGC's proposed Electronic or Electromechanical Facsimile Definition (71 Fed. Reg. 30,232 (May 25, 2006)), proposed Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)), and recently proposed alternative Class II classification regulations.

The NIGC's economic impact analysis admits several instances where it is not fully complete. For instance, the study excludes major Class II gaming markets in Florida and Oklahoma in determining the overall effect of the proposed regulations. Despite being incomplete, the study demonstrates that the currently proposed suite of regulations would have such a devastating economic impact on the Class II gaming industry, that it would be practically impossible for the industry to survive. As we and other manufacturers noted during the NIGC's last consultation on September 19 in Washington, D.C., the NIGC's proposed classification regulations, electronic facsimile definition and technical standards are currently unworkable, would require the design and construct of an entirely new form of bingo game that does not and has not ever existed, and would result in the creation of an economically unviable game that may well lead the lion's share of Class II gaming manufacturers to leave the market altogether.

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While we were encouraged by the NIGC's willingness to offer an alternative proposal to its proposed classification regulations, the proposed alternative suffers from the same fundamental infirmities as the initially proposed version, to say nothing of the independently devastating effect the proposed electronic facsimile definition and technical standards would have in their current formulation.

A better approach, and one which after this week we believe will meet with great success, would be to instead proceed solely with regulations for technical standards that are revised along the lines recommended by the joint Tribal/Manufacturer task force which met in Las Vegas, Nevada this week (from December 11-13, 2006). This group, made up of all of the major manufacturers of electronic aids to Class II games and tribal representatives, has made great progress towards coming up with a joint document that will propose a workable and practical revision to the currently proposed technical standards. It is our hope that our recommended revisions will more accurately focus the standards on the entire Class II gaming system, rather than relying on adapted Class III requirements from various international jurisdictions that focus only on the Class III machine units, or "boxes." Given sufficient time, this group will be able to suggest revisions that will result in a viable technical standard that will assist in delineating a line between Class III machine boxes and Class II electronic systems aiding the game of bingo. In devising technical regulations, it is very important to delineate the difference between the entire gaming system approach utilized for Class II gaming with traditional Class III gaming conducted at the level of the Class III machine box. While encouraging maximum flexibility in the Class II market, our goal is to suggest a standard that will provide a minimum baseline of credibility which protects the entire industry, tribal gaming operations and tribal assets.

To accomplish this goal, however, we need more time than that which is currently allotted in the comment period. Accordingly, we respectfully request that the NIGC extend the comment period on all of its inter-related proposals so as to grant the group sufficient time to accomplish our goal.

In the interim, to preserve our comments for the record and to highlight the very real world difficulties and hardships that would result from proceeding with the current proposals, we offer the following comments.

- 1. The NIGC's economic impact analysis demonstrates that its proposed Class II rules would have a devastating and unprecedented economic impact on Indian country.**

The Economic Impact Analysis prepared by Dr. Alan Meister, Ph.D., "The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations," demonstrates that the NIGC's proposed Classification Regulations would result in annual losses of \$1.483 billion in revenue across Indian Country. Such incredible costs in a single year would devastate many tribal economies and crush the industry.

The devastating economic impact of the NIGC's current proposal is starkly illustrated by the findings in Dr. Meister's report. His report confirms that:

1. The proposal would cost tribes \$1.483 billion in lost revenues per year across Indian country, which does not include ancillary lost revenues on the local and industry-wide level.
2. The proposal would result in Class II systems that are slower, more cumbersome to play, less diverse, and less appealing to patrons and which generate less revenue, as the comments of Bally and the manufacturing industry have noted.
3. No past or current Class II device would qualify as Class II under the proposed regulations, also as the comments of Bally and the manufacturing industry have noted.
4. Tribes may have to shut down their facilities; and it is likely that some smaller Indian gaming facilities would have to shut down.

Even as the Meister Report confirms the spectacular impact the proposed regulations would have on tribes throughout Indian country, it is fundamentally conservative,<sup>1</sup> and does not fully capture the cost of the NIGC proposals. As detailed below, it suffers from conservative assumptions that do not accurately reflect the impact these regulations would have on tribal economies. Accordingly, we respectfully request that it be revised along the following lines to more accurately capture the full cost of the proposed rules.

1. The Meister Report improperly downplays the impact of the regulations by focusing on Scenario 2, which excludes 75 percent (or over 40,000) of all Class II games by excluding states like Florida and Oklahoma where tribes have a "viable alternative" to Class II gaming. This assumption ignores the reality that many tribes supplement their Class III operations with Class II. The proposed Class II regulations would reduce Class II revenues regardless of whether there is a compact or not.

Class II is important not only as a supplement to Class III gaming, but also as an alternative economic engine for tribal gaming operations in the event a tribe determines that Class III compacting may not be in the overall best interests of the tribe. The proposed regulations would negatively impact both, regardless of whether there is a viable alternative, and the Meister Report should be revised to reflect this.

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<sup>1</sup> As Dr. Meister's report notes, "...estimated lost gaming revenue is likely to be conservative" because it fails to account for the fact that many facilities might have to shut down altogether.

3. The Meister Report is incorrectly based on the assumption that the proposed regulations would result in the creation and implementation of a MegaMania-type system across Indian country. The Report's calculation of lost revenues is based on the difference between revenue generated by current Class II systems and the Mega-Mania system. This assumption fails to recognize that the proposed regulations are impossible to meet and call for the creation of a game that is not economically viable.

If there are no games built to meet the new standards, there will be no Class II games for tribes to operate and the entire Class II industry could collapse. If that were to occur, lost revenues would be much higher than \$1.483 billion. By Dr. Meister's estimation, "if lost revenue is significant enough to force a gaming facility to shut down, then lost gaming revenue would equal current gaming revenue of that facility. For this reason, estimated lost gaming revenue is likely to be conservative." If the entire Class II industry were to collapse, lost revenues to tribes would be well over \$2.5 billion by Dr. Meister's own calculation.

4. Dr. Meister's Report recognizes that many facilities may have to endure temporary closure when changing over to compliant games. The study fails to account for the costs associated with temporary closures. The Report's calculation of lost revenues do not account for the full cost of the proposed regulations in the first few years of implementation where –assuming again for arguments' sake that the standards could ever be met – tribes are forced to close up shop to await certification and switch out games. During these periods, tribes would not lose 57 percent of their income, they would lose 100 percent of their income. As a result, even if the standards could be met, tribes would face the potential of a full \$2.5 billion in lost revenue in the first year alone.

5. The NIGC has improperly attempted to influence the results of the Meister Report by excluding an undefined class of Class II devices in Scenario 3 that it believes – without explanation – do not qualify as Class II. This Scenario is inconsistent with the IGRA, the NIGC's current regulations, and case law and should not be relied upon by the NIGC.

6. While the Meister Report properly accounts for lost non-gaming revenues that would result from the rules, it does not account for lost non-Indian revenues that would result. Many tribal Class II casino operations have become important economic engines for the local economy. If the regulations were promulgated as proposed, they would not only destroy the tribal gaming industry, but also result in the loss of thousands of jobs for non-Indian employees, as well as many businesses whose economies are dependent upon tribal Class II gaming. The Report does not quantify these costs, and should be revised to do so.

7. The Meister Report fails to estimate a number of other likely costs that would have to be borne by tribes as a result of the proposed regulations. While the Report recognizes that tribes would have to bear increased capital costs associated with

switching out new Class II systems, regulation, training, revenue sharing and financing, it does not quantify these costs, which could themselves be prohibitive.

We believe that the capital costs alone associated with retrofitting, replacing and/or switching out non-compliant Electronic Player Stations, Servers, Software and related Class II gaming system component would be well over \$1 billion alone. The Meister Report should be revised to fully capture all of these costs as well.

8. The Meister Report only focuses on lost tribal member casino jobs. This fails to recognize that the proposed regulations would result in the loss of a number of tribal government jobs that are dependent on Class II gaming revenue, as well as the loss of a number of non-Indian casino and casino-related jobs. The Report should be revised to properly account for these additional jobs losses as well.

**2. The NIGC's Economic Impact Analysis Confirms that its Proposals Must be Closely Scrutinized By OMB and the Congress Before They May Be Finalized.**

The economic impact analysis prepared by Dr. Meister confirms that the NIGC's proposed regulations do not – as suggested in the preamble to the proposals – meet the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 801 et seq., or the Unfunded Mandates Reform Act, 2. U.S.C. § 1501 et seq. Nor do the proposed rules meet the requirements of Executive Order 12866, Executive Order 12988, and Executive Order 13175. Taken together, these statutes and executive orders are designed to ensure that regulatory proposals of the sheer economic magnitude currently contemplated do not improperly impact small governments like tribes, regulated entities or the U.S. economy. The NIGC should reconsider its proposal in light of these requirements.

**3. The BMM Study Fails to Account for its Methodology and is Limited in Scope**

The study conducted by BMM International, LLC, is vague in its methodology and does not accurately reflect the true loss of revenue that would result from these games. First, the report does not explain the model used, and it is uncertain whether BMM used a mathematical model, and actual Class II system or some type of simulator. Accordingly, its results are unverifiable. Second, the results only list differences in revenue based on speed of play, and fail to reflect the effect of playability on revenue. In addition to increasing time of play, the proposed regulations require new design criteria like multiple touches and ball releases that will significantly hinder play and make the game much less attractive to patrons. The BMM study fails to recognize the adverse effect on playability caused by the new standards, and instead relies on the incorrect assumption that there is a direct correlation in revenue between current games and the

proposed games based solely on time of play. The study should be revised to explicitly note this limitation, and relied upon only in light of this limitation.

**4. If the NIGC Decides to Continue with its Proposed Facsimile Definition, Proposed Technical Standards and the Recently Released Alternative Classification Standards, it Must Conduct a Separate Economic Impact Analysis of Each Proposal Before Moving Forward.**

Neither the Meister Report nor the BMM study account for the cost of the proposed facsimile definition, the proposed technical standards or the recently proposed alternative to the classification standards. Both reports are focused solely on the proposed Classification standards. As a result, the NIGC's economic impact analysis of the proposal is incomplete. As we discussed in our prior comments, the facsimile definition as currently worded could have the same effect as the Classification standards and result in banning all economically viable forms of Class II gaming. If that were the case, it would result in losses of \$2.6 billion in lost revenue alone. Similarly, no game in existence currently meets the requirements of the proposed Technical standards, which we estimate would alone cost tribes and manufacturers an additional \$1 - \$2 billion to implement in their current, improperly Class III focused iteration. If the NIGC decides to move forward with this combination of regulatory proposals despite their overwhelming cost, the NIGC should complete an economic analysis of the combined effect of its proposal by assessing the impact of these rules.

As discussed above, however, we are diligently working with other manufacturers and tribes to propose a workable alternative to the NIGC which we believe would accomplish the overarching goals of the NIGC in this combined regulatory proposal while providing a workable technical standard for industry and tribes. We believe that if properly implemented with appropriate grandfathering clauses, such a proposal would cost a fraction of the NIGC's combined proposals while providing all of its intended benefits. An important part of that process, of course, is to document an estimation of the costs and benefits of the technical standards once they have been revised. While it is premature to do so before they have been revised, we believe it will be imperative to do so once work has been complete.

**5. The NIGC's Proposed Alternative Classification Standards Still Do Not Result in an Economically Viable Game, and are Unrelated to the Statute**

The NIGC's alternative proposal for classification standards, like the earlier version, result in an economically unviable game and impermissibly limits the use of

electronic aids to the game of bingo. In addition, it would improperly and illegally grant States the unprecedented authority to take part in Class II gaming. Rather than continue work on this conceptual alternative proposal, we believe that the NIGC's focus should be on creating a workable alternative to the technical standards which if properly revised and implemented could achieve all of the NIGC's goals at a fraction of the cost to manufacturers and tribes across the country. However, we offer the following comments on the proposed alternative classification regulations.

The alternative proposal is as arbitrary as the original, neither of which is based on the game of bingo. Rather than interpret the IGRA's statutory requirements for the game of bingo, the alternative proposal seeks to force a game design that does not exist, nor has ever existed.

Many of the objections we raised in our previous comments apply to the new proposal, and we do not repeat them here in their entirety. To summarize, however, the proposal still requires multiple ball releases, when there is no legal basis for doing so. Nor is there any legal basis for the prohibition of auto-daub, for the prohibition of pre-drawn balls, to restrict games similar to bingo to an arbitrary ball draw range and 5 by 5 card, to limit bingo to a 75 ball draw and 5 by 5 card, to label a game "bingo," even if the two-inch letter size is abandoned and replaced with vague standard, or to require common patterns or probabilities.

The new proposal would also illegally allow States a role in influencing Class II gaming. For the first time, the proposal would allow states to be notified of an objection to Class II game certification. Any State regulation of Class II gaming conducted by Tribes is clearly contrary to established law, and should not be permitted under the classification regulations or any other regulation. This grant of unprecedented authority to the States is contrary to the IGRA, which expressly granted States authority only over Class III gaming, reserving Class II for the tribes with oversight by the NIGC. It is also fundamentally at odds with tribal sovereignty.

Any alternative to the classification standards, such as this one described herein, which makes such material changes to the proposed rule, must be published as a new proposed rule with full opportunity for comment by the affected community.

We appreciate the time and attention given to these matters by the NIGC.

Sincerely,



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Bally Technologies, Inc.