

September 13, 2006

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

Re: Comments on Class II Classification Standards and
Electromechanical Facsimile Definitions

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NATIONAL INDIAN GAMING COMMISSION
WASHINGTON, DC 20005

Dear Chairman Hogen and Vice Chairman Choney:

The undersigned are the seven tribal members of the Class II Advisory Committee selected by the National Indian Gaming Commission in early 2004 to assist with the development of new Class II regulations. We are submitting these comments to express our unanimous opposition to both the proposed change to the definition of “facsimile” (71 Fed. Reg. 30,232 (May 25, 2006)) and the proposed Class II classification regulations (71 Fed. Reg. 30,238) (May 25, 2006)).

As an initial matter, we do not believe that the Commission’s explanation of the views of the tribal representatives on the Advisory Committee comes close to expressing the level of our unified opposition to the various decisions made by the Commission in developing these regulations. The Commission claims that “[t]he seven tribal committee representatives provided early tribal input and valuable insight, advice, and assistance to the Commission in developing each of the respective working drafts, as well as the current proposed regulations.” 71 Fed. Reg. at 30,240. The Commission acknowledges some disagreement, but states that “there were many areas of accord” and summarily dismisses our objections, suggesting that the arguments made by the tribal representatives were based on a “desire to assure that the games are economically viable,” while the Commission “is bound by Congress’ intent,” as though the two concepts are mutually exclusive.¹

In fact, there was almost no “accord” between the Commission and the tribal representatives on the Advisory Committee. While the Commission made a few token concessions to our positions, it rejected every major substantive objection that we raised. Most of our major substantive objections were unanimous positions. While the Commission repeatedly stated that it heard our concerns, we had no role in drafting the proposed regulations and with each draft circulated by the Commission, it became increasingly clear that our concerns were being ignored.

¹ We are advised that there is nothing in the language of the IGRA or its legislative history that supports the restrictive approach that the Commission has adopted.

While none of us are attorneys, we do have significant experience in the area of gaming generally and Indian gaming specifically. We understand the game of bingo and the types of technologies used to play bingo and similar games in both Indian and non-Indian facilities.² Thus, even though we were generally prevented from consulting with our attorneys during the meetings of the Advisory Committee, we had no doubt that the requirements being developed by the Commission bore little relationship to any bingo game ever played.³ We also were very troubled by statements by Commission staff that court decisions limiting Class II gaming must be strictly followed (apparently correctly decided), but that it was free to disregard favorable decisions on Class II gaming (apparently wrongly decided). The proposed regulations reflect this double standard.

In our collective opinion, the Commission intended from the beginning to develop regulations to significantly limit the commercial viability of Class II gaming. We understand that the Commission was under pressure from the Justice Department to “rein in” Class II gaming and that many of the restrictions in the regulations were added in an attempt to appease the Justice Department. This is clear from a quick comparison of draft 5 of the proposed regulations with the version actually published in the Federal Register. Rather than respond to the tribal concerns about draft 5, the NIGC only responded to concerns raised by the Justice Department. As a result, the published rule (which includes many changes suggested by the Department) is much more restrictive than draft 5. Most of the changes are arbitrary changes to slow game play and make the games less appealing to players.

Our respective tribes will be submitting more detailed comments on the proposed regulations. However, we would like to collectively emphasize the following objections:

1. New “Facsimile” Definition. We have great concerns about the NIGC’s proposal to amend the definition of “Electronic or Electromechanical Facsimile” found at 25 C.F.R. 502.8.⁴ According to the NIGC, this change is necessary to “make[] clear that

² While these comments focus on the game of bingo, we also have significant concerns about the Commission’s restrictive approach to pull-tabs. Comments on pull-tabs will be submitted by our respective tribes.

³ We have, of course, been assisted by legal counsel in preparing these comments.

⁴ The present rule, adopted in 2002, provides the following definition:

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.

The proposed rule would change the definition to the following:

(a) 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.

all games including bingo, lotto and ‘other games similar to bingo,’ when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game.” 71 Fed. Reg. 30234.⁵ This proposed change fails to recognize that both the legislative history of IGRA and case law indicate that the relevant test for facsimile is not whether the game is played in an electronic format, but whether the electronic format changes the fundamental characteristics of the Class II game by permitting a player to play alone with or against the machine.

While the IGRA provides that Class II gaming does not include “electronic or electromechanical facsimiles of any game of chance or slot machines of any kind,” 25 U.S.C. 2703(7)(B)(ii), the term “facsimile” is not defined by the statute. However, the legislative history suggests that Congress did not intend the facsimile prohibition to restrict the use of electronics to play bingo games. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and not with or against other players. As explained in the Senate Report:

The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made

(b) Bingo, lotto, and other games similar to bingo are facsimiles when:

(1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or

(2) An element of the game’s format allows players to play with or against a machine rather than broadening participation among competing players.

(Emphasis added.)

⁵ As an initial matter, it is not clear from the proposal which characteristics are “fundamental” and what it means to “incorporate” a characteristic into an electronic format. If anything, this change to the definition of facsimile further confuses the distinction between Class II and Class III.

practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446 at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphasis added).

In other words, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a “facsimile.” Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. 2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play “with or against a machine rather than with or against other players.”

The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. See United States v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1100 (9th Cir. 2000); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 724 (10th Cir. 2000).⁶ As drafted, the NIGC’s proposed change to the

⁶ The applicable test for distinguishing between aids and facsimiles was explained by the Tenth Circuit:

Courts reviewing the legislative history of the Gaming Act have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the “aid” must operate to broaden the participation levels of participants in a common game, see Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) **the “aid” is distinguishable from a “facsimile” where a single participant plays with or against a machine rather than with or against other players.** Cabazon Band of Mission Indians v. National Indian Gaming Comm’n, 304 U.S. App. D.C. 335, 14 F.3d 633, 636-37 (D.C. Cir.), cert. denied, 512 U.S. 1221, 129 L.Ed.2d 836, 114 S.Ct. 2709 (1994) (Cabazon III). Courts have adopted a plain-meaning interpretation of the term “facsimile” and recognized a facsimile of a game is one that replicates the characteristics of the underlying game. See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994) (“the first dictionary definition of ‘facsimile’ is ‘an exact and detailed copy of something.’” (quoting Webster’s Third New Int’l Dictionary 813 (1976))), cert. denied, 516 U.S. 912, 133 L.Ed.2d 203,

definition of “facsimile” ignores this critical distinction and would unlawfully restrict the range of technologic aids available to tribes. There is no reason for the NIGC to alter the current definition, which was adopted in 2002 for the express purpose of bringing the NIGC’s previous definition of “facsimile” into compliance with case law.⁷

2. Class II Classification Standards. The NIGC proposal includes a comprehensive regulatory scheme in a new Part 546 for classifying and certifying Class II “games played with electronic components.” Proposed 546.2. The proposed rule contains detailed requirements for such games and a process for approval by an NIGC-approved testing laboratory and the NIGC. Tribal gaming commissions are permitted to impose additional requirements, but otherwise have no meaningful role in the framework proposed by the NIGC. This is contrary to the IGRA, which specifies that tribes have the primary responsibility to “license and regulate ... class II gaming on Indian lands within such tribe’s jurisdiction” 25 U.S.C. 2710(b)(1).

In addition, the substance of the proposed classification regulation would unlawfully restrict the range of Class II games available to tribes. The proposed rule would restrict tribes to “traditional” bingo and allow only minor variations for games similar to bingo.⁸ It also would restrict the types of technologic aids available to tribes for Class II games.⁹ Ironically, the proposal would use technology to restrict Class II gaming by requiring that Class II aids comply with arbitrary restrictions designed to slow game play, restrict prizes values and mandate levels of player participation and interaction with the aid device.

However, by broadly defining bingo to mean any game that meets three basic requirements set out in the IGRA, Congress intended to cast a wide net to allow tribes to offer an expansive range of game variations under the broad category of bingo. 25 U.S.C. 2703(7)(A)(i). In fact, Congress made clear that tribes could offer not just “bingo,” but numerous related games – “pull-tabs, lotto, punch boards, tip jars, instant

116 S.Ct. 297 (1995); Cabazon II, 827 F. Supp. at 32 (same); Cabazon III, 14 F.3d at 636 (stating “[a]s commonly understood, facsimiles are exact copies, or duplicates.”).

162 MegaMania Gambling Devices, 231 F.3d at 724 (emphasis added).

⁷ The prior definition equated “facsimile” with the term “gaming device” as defined by the Johnson Act. The courts rejected this definition. In our view the proposed new definition that the Commission is proposing is equally arbitrary and not supported by the language of the IGRA or its legislative history.

⁸ In the preamble to the proposed regulations the Commission explains that it has decided to reject the view, expressed in the preamble to its 2002 regulations, that games similar to bingo are not required to meet all of the statutory requirements of bingo. As explained by the Commission in 2002, a game that meets all of the requirements of bingo would be bingo – not a game similar to bingo. According to the Commission, it was wrong in 2002 and even games similar to bingo must meet all of the statutory requirements for bingo. 71 Fed. Reg. 30250. Only minor differences (the number of spaces on the card and the size of the ball draw) would be permitted for games similar to bingo, even though such games were previously recognized as “bingo.” This dramatic change in position is, for the reasons expressed by the NIGC in 2002, illogical and contrary to the plain language of the IGRA.

⁹ For example, the NIGC proposes to impose numerous arbitrary limitations on the value of the game-winning prize, size of the ball draw, size of the bingo card, the number of releases of bingo numbers, the size of each release, the time period for each release, and the length of each daub period.

bingo," *Id.* Moreover, rather than stop with the enumerated list of games, Congress then went on to specify that tribes also could offer any "other games similar to bingo." In short, Congress was not trying to limit tribes to a restrictive set of bingo-type games (such as only games with a 5x5 card and 75 numbers), but, consistent with the Supreme Court's ruling in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), to recognize that tribes were entitled to offer a very vast range of Class II games. As explained in the Senate Report, "Consistent with tribal rights that were recognized and affirmed in the Cabazon decision, the Committee intends ... that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development." S. Rep. No. 100-446 at 9. Further emphasizing the broad scope of Class II, Congress also explicitly stated that tribes could offer such games with "electronic, computer, or other technologic aids." 25 U.S.C. 2703(7)(A)(i).

In other words, the IGRA already draws a bright line between Class II and Class III gaming, allowing tribes to play as Class II games a wide range of bingo and specified bingo-like games and permits electronics to be used in the play of such games, as long as the electronics do not allow a player to play alone with or against the device. In the case of bingo, the IGRA specifies the requirements for a game to qualify as Class II bingo. Thus, any game that meets the three IGRA classification requirements for bingo can be played with electronic aids as a Class II game, as long as the electronics are "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. Rep. No. 100-446 at 9. There is no basis for the NIGC to impose additional classification requirements that go beyond those set forth by Congress.

The courts have agreed with this expansive reading of Class II. As explained by the Ninth Circuit:

The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.

There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

Further, IGRA includes within its definition of bingo "pull-tabs, ... punch boards, tip jars, [and] instant bingo ... [if played in the same location as the game commonly known as bingo]," 25 U.S.C. § 2703(7)(A)(i),

none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. ... Instant bingo, for example, is as the Fifth Circuit explained in *Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner*, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. *See id.* at 192-93.

Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C. § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

103 Electronic Gambling Devices, 223 F.3d at 1096. See also 162 MegaMania Gambling Devices, 231 F.3d at 723 ("While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed.").

Nevertheless, the NIGC has crafted a regulatory scheme that turns Congress's authorization for tribes to be able offer an expansive range of electronically-aided Class II games into a narrow authorization for a very limited form of electronic bingo. The end result is the creation by the NIGC of a new game that likely has never been played in any bingo hall at any time. Moreover, no electronic bingo game previously approved by the courts or the NIGC would satisfy these requirements. This certainly is not what Congress intended when it enacted the broad Class II provisions of the IGRA.

Significantly, it also is not how the NIGC has previously interpreted the IGRA. In the preamble to its 1992 definition regulations, the NIGC stated:

[One] commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.

[Another] commenter questioned whether the definition of bingo in the IGRA limits the presentation of bingo to its classic form. The Commission does not believe Congress intended to limit bingo to its classic form. If it had, it could have spelled out further requirements such as cards having the letters "B" "I" "N" "G" "O" across the top, with numbers 1-15 in the first column, etc. In defining class

II to include games similar to bingo, Congress intended to include more than "bingo in its classic form" in that class.

..... Congress enumerated the games that fall within class II except for games similar to bingo. For games similar to bingo, the Commission added a definition that includes the three criteria for bingo and, in addition, requires that the game not be a house banking game as defined in the regulations. The Commission believes that Congress did not intend other criteria to be used in classifying games in class II.

57 Fed. Reg. at 12382, 12387 (1992).

Thus, contrary to the plain language of the IGRA, the legislative history, relevant case law and the NIGC's own prior positions, the NIGC has proposed to dramatically restrict both the range of games that qualify as Class II, as well as the technologic aids that can be used to play such games. Rather than proceed forward with regulations that are almost certain to be struck down as unlawful by the courts, we call on the NIGC to withdraw the regulations and work with tribes "to protect such [Class II] gaming as a means of generating tribal revenue." 25 U.S.C. 2702(3).

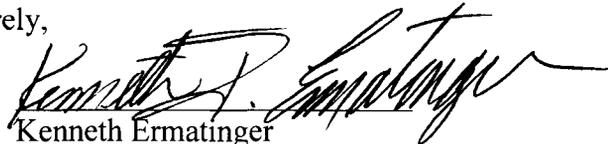
Conclusion

As the tribal representatives selected by the NIGC to assist with the development of Class II regulations, we are profoundly disappointed by the proposed regulations developed by the NIGC. The proposed regulations go far beyond what is necessary to clarify the line between Class II and Class III gaming and appear to be little more than an attempt to appease the Justice Department (which has historically has taken an overly restrictive view of what Congress authorized in the IGRA) and certain states that are opposed to commercially viable Class II gaming. We sincerely hope that the Commission will step back from this misguided effort and instead work with tribes to develop Class II regulations that reflect the broad scope of Class II gaming intended by Congress.

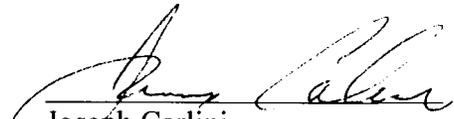
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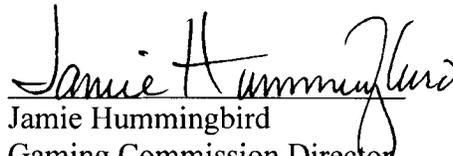
Charles Lombardo
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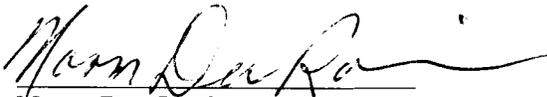
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cc: Penny Coleman
Acting General Counsel