

November 15, 2006

Penny J. Coleman  
Acting General Counsel  
National Indian Gaming Commission  
1441 L Street NW, Suite 9100  
Washington, DC 20005

Re: Comments on Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids"; Definition for Electronic or Electromechanical Facsimile; and Technical Standards for "Electronic, Computer, or Other Technologic Aids" Used in the Play of Class II Games.

Dear Ms. Coleman:

I write on behalf of Diamond Game Enterprises, Inc. to comment on the National Indian Gaming Commission's ("NIGC") proposed rule titled *Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids"* ("Classification Standards").

The game vital to Diamond Game's tribal customers is "pull-tabs," one of the games specifically enumerated under IGRA's Class II definition. After reviewing the Classification Standards, it appears that they may, intentionally or unintentionally, prohibit players from building, playing, and/or collecting credits on an electro-mechanical dispenser of pull-tabs. This is of great concern to Diamond Game's Indian tribal clientele as many depend heavily on the dispensers and would suffer significant economic harm if such dispensers were prohibited. For the reasons set forth below, we respectfully recommend that the NIGC remove paragraph 546.7 (g) (requiring the pull-tab be redeemable for a prize) and 546.7(i) (prohibiting the dispenser from dispensing winnings or vouchers to the player).

**I. Classification Standards are inconsistent with the three Federal Courts of Appeals decisions permitting the Lucky Tab II and Magical Irish pull-tab dispensers.**

As the NIGC is well aware, several Federal Courts of Appeals have addressed the critical distinction between a technological aid and a facsimile in the context of a pull-tab game. In two

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cases, pull-tab devices have been found to be facsimiles and therefore, ineligible for Class II treatment. See *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633 (D.C. Cir. 1994) (holding that a video pull-tabs game was a computerized version of pull-tabs and therefore a Class III facsimile); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541-42 (9<sup>th</sup> Cir. 1994) (holding that a self-contained unit containing a computer linked to a video monitor and printer constitutes an electronic facsimile of pull-tabs). By contrast, the Eighth, Tenth, and D.C. Circuits both held the original Lucky Tab II device to be a technological aid to Class II gaming. See *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8<sup>th</sup> Cir. 2003); *cert denied*, 540 U.S. 1229 (2004); *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (10<sup>th</sup> Cir. 2003); *cert denied*, 540 U.S. 1218 (2004); *Diamond Game Enterprises, Inc. et. al. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000).

The Lucky Tab II device is considerably different from the games at issue in *Cabazon* and *Sycuan*. Both the D.C. Circuit in *Cabazon* and the Ninth Circuit in *Sycuan* agreed on the basic definition of what constitutes a Class III facsimile. A facsimile, they held, is an exact electronic or electromechanical copy or duplicate of an enumerated Class III game such as pull-tabs: A computer randomly selected a card for the player, pulled the tab at the player's direction, and displayed the result on a video monitor. No paper was involved. A pre-programmed computer chip generated a predetermined number of winning tickets from a predetermined finite pool of tickets -- in other words, the deal was computer generated. Upon receiving a winning ticket, a player could either ask for a printout for redemption at a cashier or simply have the winnings credited to his/her account.

Both the D.C. and Ninth Circuits viewed these computer devices as an exact electronic replica of paper pull-tabs or, as the Ninth Circuit put it, "self-contained computer games copying the pull-tab principle . . . played electronically." *Sycuan*, 54 F.3d at 542. As such, both Circuits concluded that they were facsimiles -- and must be deemed Class III games. Important to those decisions was the deference the Courts gave to the opinion of the NIGC, which had found that the games in question were facsimiles and, therefore Class III devices.

The Lucky Tab II game dispenses pull-tabs from a paper roll within the machine. The rolls of pull-tabs come from a deal containing a random distribution of winning tabs. That random generation of winners is pre-set and printed before the rolls are installed in the devices. The rolls from a given deal are distributed to multiple devices and may be sold separately over-the-counter. The device cuts a single pull-tab from the internal roll and drops it into the tray while a bar code scanner inside the machine automatically reads the tab and displays its contents on the video screen. Players retrieve their ticket from the tray and examine their game result on

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the ticket, which matches the game result on the video screen. Players may also have the option of purchasing pull-tabs from a clerk and handing winning tabs to a clerk for payment.

There is no legal support for the notion that the court-approved Lucky Tab II device cannot build and cash credits, a function that clearly falls in the category of “aiding” the game of pull-tabs (i.e. by providing a “cashier” function to the device, which is permitted in bingo devices), rather than the category of a “facsimile” of the game of pull-tabs since the game remains in the pre-printed paper tabs. Additionally, the pre-printed tabs dispensed to the player on each play make the dispenser readily distinguishable from a Class III slot machine.

In our view, the most critical aspect of the *Santee Sioux*, *Seneca-Cayuga*, and *Diamond Game* decisions was the fact that “the game is in the paper rolls” – that is, the arrangement of winners comes from an order established by the paper roll and is not generated (as in the devices at issue in *Cabazon* and *Sycuan*) by a computer chip internal to the device. As the Eight Circuit underscored with respect to Lucky Tab II, “the paper pull-tab card itself is the player’s only path to winning. The machines have nothing to do with the outcome of game.” *Santee Sioux*, 324 F.3d at 614; *see also Diamond Game*, 230 F.3d at 370 (“[i]nstead of using a computer to select patterns, the Lucky Tab II actually cuts tabs from paper rolls . . . Without the paper rolls, the machine has no gaming function at all. It is, in essence, little more than a high-tech dealer. Viewed this way, the game played with the Lucky Tab II is not a facsimile of paper pull-tabs, it is paper pull-tabs.”) (emphasis in original).

Thus, even if a pull-tab dispenser built and cashed credits, the game ultimately remains in the paper. Mechanically, the device still cuts and dispenses paper tabs. Paper pull-tabs from the same deal as played in the machines may be purchased over the counter (a fact distinguishing this from the facsimile machines in *Cabazon* and *Sycuan*). Thus, players buying over the counter compete directly with machine gamblers. Pull-tab dispensers that simply give a pull-tab card to the player in exchange for money (or its equivalent), in the same fashion as a live cashier would, “do not change the fundamental characteristics,” S. Rep. 100-446, 100<sup>th</sup> Cong., 2d Sess. (1988) at 9, of the games. They therefore fall within the range of operations Congress meant to authorize as “aids.” A simple hypothetical reinforces the point. Imagine a blackout at a casino using dispenser which build and cash credits. Pull-tab play could still continue simply by opening up the machines and selling pull-tabs manually from the deals. By contrast, the play of pull-tabs using the machines evaluated in *Cabazon* and *Sycuan* would end with the loss of electricity to run the computerized tab generator.

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On this point, as the D.C. Circuit also observed, the NIGC, in its Class II opinion letter regarding the Tab Force Instant Pull-Tab ticket system, concluded that when the chance element of the game exists exclusively in the play of the pull-tab, the device itself is not applying any element of chance. And because the device itself did not contribute to the element of chance, the NIGC designated Tab Force a Class II technological aid.

With respect to Tab Force, the NIGC wrote: "Further, each System [machine/game] is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile. The paper pull-tab itself is the game. The pull-tab game is purchased separately and may be played separately without the aid of the system. There is, therefore, no element of chance inherent in either System." NIGC Advisory Letter on Tab Force Instant Pull-Tab Ticket Validation System and Multi-Tab Pull-Tab Game System, June 8, 1999. In our view, the same analysis applies to Millennium.

## II. Classification Standards are inconsistent with existing NIGC regulations.

The building and playing of credits on a pull-tab dispenser is consistent with the existing regulatory definition of a technologic aid. The device assists the player or the playing of the game by providing a cashier function. See 25 U.S.C. § 502.7(a)(1). The dispenser remains readily distinguishable from a electronic or electromechanical facsimile of a game of pull-tabs. Such a reading is consistent with the existing definitional regulations which define electronic or electromechanical facsimile as "a game played in an electronic or electromechanical format that replicates a game of chance by incorporating *all* of the characteristics of the game . . ." 25 C.F.R. § 502.8 (emphasis added); see also *Cabazon*, 14 F.3d at 636 (a game is no longer a Class II game when it is "wholly" incorporated into an electronic or electromechanical version).<sup>1</sup> A dispenser which builds credits contains no mechanism for determining the winner of the pull-tab game it assists. Indeed, unlike slot machines or the devices at issue in *Cabazon* and *Sycuan*, the device is not wholly electronic. The game is in the paper pull-tabs, from which the device merely dispenses one tab at a time. The game is not a computerized replica of the paper pull-tab game.

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<sup>1</sup> This conclusion is in accord with decisions of the Ninth and Tenth Circuits holding that MegaMania is Class II, notwithstanding the fact that the player terminals allow players to accumulate and play credits resulting from previous outcomes. See *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091 (9<sup>th</sup> Cir. 2000); see also *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10<sup>th</sup> Cir. 2000). There is certainly no basis to conclude that a different rule should apply to aid devices that dispense paper pull-tabs and do not constitute exact electronic replicas of the underlying game.

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“Nor, put in terms of the NIGC’s regulations implementing IGRA, is the Machine an ‘electronic or electromechanical facsimile,’” *Seneca-Cayuga*, 327 F.3d at 1043 (citing 25 C.F.R. § 502.7(a)(2)), as the device does not incorporate all of the characteristics of pull-tabs. *See Cabazon*, 14 F.3d at 636 (Class II aids are distinguishable from Class III facsimiles, which are “exact copies or duplicates” of the paper game in electronic form); *see also Sycuan*, 54 F.3d at 542 (Class II aid is distinguishable from a facsimile, which is “an exact and detailed copy of something” in electronic form). Because this game version is not a self-contained, electronic version of pull-tabs, but rather a device that assists the play of paper pull-tabs, it should not constitute a Class III facsimile.

In addition to the foregoing, the building and playing of credits does not change the fact that players compete against one another to obtain winning paper cards from a set of cards that contains a predetermined number of winners. As the Tenth Circuit Court of Appeals held in *Chickasaw Nation v. United States*, “when a player purchases a ticket [from a pull-tab deal], he is competing against all other persons who purchase tickets from that same series,” because all players are competing for the limited number of winning tickets distributed randomly within the same deal. 208 F.3d 871, 877 (10<sup>th</sup> Cir. 2000). The *Chickasaw* Court specifically rejected the contention that each individual pull-tab should be viewed as a separate game with only one person playing the game by peeling the ticket. *Id.* The dispensers merely deliver pull-tabs from a roll that is part of a larger deal, those who use the device to play the game of pull-tabs are competing against all other persons who purchase pull-tabs from the same deal. *See Cabazon II*, 14 F.3d at 637 (holding that even in a fully computerized version of pull-tabs, the players compete against one another and not against the machine). As set forth in 25 C.F.R. § 502.7(b)(3), such a feature is indicative of a technological aid.

The building and playing of credits also does not change the fact that the dispensers broaden the participation level of the game of pull-tabs. The dispenser provides another way for players to purchase pull-tabs from a pull-tab deal, and thereby enables tribes to sell more pull-tabs than they could sell through clerks alone. In this way, the device increases the number of players simultaneously participating in the game of pull-tabs. Increased sales of pull-tabs also permit tribes to increase the size of each deal, thereby expanding participation in each pull-tab game. As set forth in 25 C.F.R. § 502.7(b)(1), such a feature is indicative of a technological aid.

Lastly, existing NIGC regulations provide a set of specific examples of technologic aids to “assist the public and the industry in interpreting the scope of permissible aids by enumerating examples that have already been deemed lawful.” *See Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo*, 67

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Fed. Reg. 41166, 411670 (June 17, 2002) (Final Rule). Specifically, “pull tab dispensers and/or readers” are specifically included in the list of technologic aids. 25 C.F.R. § 502.7(c). As the Eighth Circuit posited, “the current regulations seem to expressly contemplate the use of Lucky Tab II pull-tab dispensers/readers, suggesting that the NIGC has now given its imprimatur to these types of machines.” *Santee Sioux*, 324 F.3d at 615-16.<sup>2</sup> Nothing in that case or in the current regulations suggest that the building and playing of credits should change the Class II status of an otherwise legal dispenser.

It must be observed that the D.C. Circuit stated that one factor “reinforcing” Lucky Tab II’s Class II designation was the fact that Lucky Tab II pull-tabs had to be redeemed at a cashier. But we do not read this one factor as especially significant to the D.C. Circuit’s ultimate class designation. Moreover, the D.C. Circuit’s discussion of this point might be considered overly simplistic. Whether a winning tab is redeemed through the device or by a teller at a cashier’s window, the winning combination is verified by an electronic scanner. The fact that in one scenario the scanning is done by a machine and in the other scenario the scanning is done manually does not seem all that pertinent to the issue of game classification. As with the original Lucky Tab II, “the game is in the paper rolls,” *Diamond Game*, 230 F.3d at 370, and “the paper pull-tab card itself is the player’s only path to winning.” *Santee Sioux*, 324 F.3d at 614.<sup>3</sup>

### **III. Permitting the building and playing of credits helps to assure that gaming is conducted fairly and honestly by both operator and the players.**

Security and MICS compliance is far better assured where pull-tab dispensers permit winning tabs to be credited at the machine rather each winning ticket having to be exchanged for cash. The ability to redeem a tab at the machine virtually eliminates the need to give the tab to a cashier, who must then produce cash to pay the customer. Since it is untenable to require a player to leave his seat every time he needs to cash a tab, tribes are put in the difficult position of having to position roving cashiers around the casino carrying thousands of dollars in cash. Allowing the machine to aid the game by acting as a cashier essentially eliminates those multiple

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<sup>2</sup> The Tenth Circuit concluded that “the NIGC’s determination in 25 C.F.R. § 507.2 that IGRA authorizes Class II technologic aids for pull-tabs is a ‘permissible construction of the statute.’” *Seneca-Cayuga*, 327 F.3d at 1040.

<sup>3</sup> It is worth noting that the redemption of prizes when playing Millennium is not entirely automatic. Just as a player of manual pull-tabs may forfeit a prize by failing to redeem a winning tab, so too a player of Millennium forfeits the prize if a winning tab is not redeemed in a timely fashion. In this way, Millennium preserves a human element in the process of prize redemption.

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cash transactions, greatly reducing the risk of theft, shortages, losses, etc. Accordingly, by incorporating this feature, it serves to strengthen the internal control aspects of the game, thus fulfilling an important policy goal of IGRA – which is “to assure that gaming is conducted fairly and honestly by both operator and the players.” 25 U.S.C. § 2702; *see also* 25 C.F.R. § 542.8 (minimal internal control standards for pull-tabs). Accounting for pull-tab dispensers that allow credits can all be done via normal drop procedures and accounting reports that fully, accurately, and securely comply with the MICS. Requiring tribes to revert to the original Lucky Tab II-style game at this point would be a major step back in the technological developments that have helped protect Indian gaming from unscrupulous elements.<sup>4</sup>

#### **IV. Classification Standards are inconsistent with NIGC’s prior positions.**

Lastly, the Classification Standards are inconsistent with the NIGC’s prior positions. As you are aware, the NIGC *expressly* permitted the Poarch Band of Creek Indians of Alabama and the Seminole Nation of Oklahoma to operate Lucky Tab II pull-tab dispensers which allow players to build and play credits (the “Millennium” version). Such a position and policy was consistent with the NIGC’s existing regulatory framework (as discussed above), as well as the draft regulations that were circulated last year.

#### **V. Conclusion.**

When Congress enacted IGRA, it expressly authorized tribes to operate pull-tabs and other Class II games, and expressly authorized tribes to employ “technologic aids.” Moreover, Congress’ purpose in enacting IGRA should be considered when the NIGC interprets it. Principal among those purposes is to promote “tribal economic development [and] self-sufficiency.” 25 U.S.C. § 2702(1). That interest would certainly be served by allowing tribes the greatest flexibility to offer games through dispensers or use technology in connection with pull-tabs that does not alter its character as a game. The Classification Standards could ban certain dispensers that build and play credits despite the fact that they utilize pre-printed, paper pull-tabs which are read and dispensed to the player on each play, the essence of the court-approved dispensers. For these reasons, Diamond Game suggests that that the NIGC eliminate paragraph

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<sup>4</sup> The Senate Report accompanying IGRA notes that “the Committee intends [in its definition of Class II gaming] that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing game sizes, levels of participation, or current technology. S. Rep. 100-446 at 9.

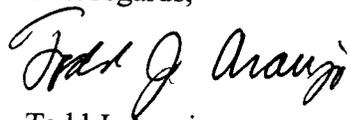
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546.7 (g) (requiring the pull-tab be redeemable for a prize) and 546.7(i) (prohibiting the dispenser from dispensing winnings or vouchers to the player).

Best regards,



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cc: James Breslo  
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