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Via Hand Delivery and First Class Mail

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 the Seminole Tribe of Florida (the "Tribe") on the Economic Impact Analysis of the National Indian Gaming Commission's ("NIGC") proposed Class II Classification Regulations (71 Fed. Reg. 30,238 (May 25, 2006) prepared by Dr. Alan Meister, "The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations," and the report prepared by bmmtestlabs "Comparison Analysis of Various Class II Configuration Options." We also offer several additional comments on the NIGC's 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)), as well the NIGC's recently proposed alternative Class II classification regulations.

The NIGC's proposed regulations would have a staggering economic impact on Indian country generally, and the Seminole Tribe in particular. As Dr. Meister's study demonstrates, promulgation of the Classification Standards alone would cause \$1.483 billion in lost annual revenue for tribes across Indian country. While that figure alone should be sufficient cause for the NIGC to reconsider its proposal, it does not include the whole cost to the industry. Dr. Meister's study does not include the costs associated with the facsimile definition, which as discussed in our previous comments, would end all Class II gaming, resulting in losses of over \$2.5 billion. Nor does the study include the cost of the proposed technical standards, which we understand would be over \$1 billion. While these numbers strongly suggest that the NIGC should reconsider its proposal, at the very least it should conduct economic impact analyses of these other aspects of its proposal before moving forward.

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The devastating impact of these regulations would fall heavily on the Seminole Tribe. The Seminole Tribe, like many other tribes, relies on its Class II gaming revenues to fund nearly all of its governmental programs. Any one of the three proposed regulations could result in the Tribe having to shut its doors and turn out the lights.

All three proposals would prohibit viable Class II gaming, and while the Tribe has a legal right to Class III gaming, it may be some time until the Tribe can exercise that right. If the proposed regulations were promulgated as proposed, the result would be the end of class II gaming for the Tribe. The Tribe would have to end payments to its thousands of employees and members, shut down most of its governmental programs, close most of its facilities, lose capital investment, and be placed in a precarious position with its bondholders and investors. Tribal government would be hobbled, tribal office buildings closed, and tribal services shut down.<sup>1</sup> While we recognize that this was surely not the intention of the NIGC in proposing these regulations, that is the stark reality they present. We urge the NIGC to reevaluate its proposals in line with our earlier comments so that such a dramatic, unreasonable and unnecessary result can be avoided.

In doing so, we note that 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 contemplated herein 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.

**1. Dr. Meister's Report demonstrates that the NIGC's proposed 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 staggering losses, even over a single year, would devastate many tribal economies.

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

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<sup>1</sup> This risk was not lost on Dr. Meister, who recognized that: "Some tribes that rely heavily on Class II machines for tribal government revenue could be severely impaired if facilities are forced to shut down. Essential tribal operations, programs, and services could be in jeopardy of being lost."

1. The proposal would cost tribes \$1.483 billion in lost revenues per year across Indian country.
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.
3. No past or current Class II device would qualify as Class II under the proposed regulations.
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>2</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 like ours. 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 where tribes have a “viable alternative” to Class II gaming. While it is true that the Seminole Tribe has every legal right to conduct Class III gaming through a compact with the State of Florida or through the issuance of Secretarial Procedures, there is a difference between having that right and being presently able to exercise it. As the result of a combination of legal maneuvers and delay tactics by the State of Florida and the Department of the Interior, the Seminole Tribe still has not obtained a compact from the State or Secretarial Procedures. And even if Interior issues procedures for the Tribe, the State has a lawsuit pending challenging the issuance of procedures that would be revived and which may take years to resolve.

While the three year grandfathering clause proposed in the NIGC’s recent proposed alternative classification standards might be sufficient, it just as easily might not be. Moreover, even if the Tribe were able to obtain the present right to conduct Class III gaming in that time period, it would still need additional time to transition its gaming floor from Class II to Class III (see Report at 14). As a result, it is unclear whether the Seminole Tribe will have Class III as a viable alternative during the transition period. That uncertainty alone is insufficient cause to exclude Florida from the calculation of the nationwide impact of the proposed regulations. An error in estimation by the NIGC by even one year would result in hundreds of millions of dollars of lost revenues. Accordingly, Dr. Meister Report’s should be revised to focus on Scenario 1 which includes all states, rather than Scenario 2, which does not.

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<sup>2</sup> “...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.

2. Along the same lines, removing Class II machines operated in Florida and Oklahoma from the analysis because there is a “viable” Class III alternative ignores the fact 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. As a result, it is incorrect for the Report to state, as it does, that “...if the Florida tribes are successful in obtaining Class III machines, as expected, the proposed changes to Class II regulations would have no effect on the Florida tribes.”

Class II is important not only as a supplement to Class III gaming, but also as a negotiating tool for Class III compacting. The proposed regulations would negatively impact both, regardless of whether there is a viable alternative, and the Report should be revised to reflect this.

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. Its 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, and that the gaming manufacturers have stated that they may not be able to stay in the market to produce any new Class II games if the current regulations are promulgated as they stand. 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.

4. Dr. Meister’s Report recognizes that many facilities may have to endure temporary closure when changing over to compliant games. Assuming, again, that even if the standards were changed to render the games viable, the study fails to account for the costs associated with temporary closures. The lost revenues calculated by Dr. Meister represent annual losses based on a 57 percent reduction in income caused by playing a Mega-Mania type system rather than currently allowed systems. They 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. Additionally, in a market like Seminole’s where there is already competition from non-Indian gaming including slot machines, there is an even greater risk that tribes such as Seminole could lose their gaming clients to non-Indian competition while fighting for a class III compact or Secretarial Procedures. While the Meister Report recognizes this risk (at 11), it does not account for the lost revenue that would result.

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 have been advised by our manufacturer vendors that the capital cost of replacing and/or switching out all current Class II systems with new Class II systems (which is what the proposal would require) 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 BMM Study Fails to Account for its Methodology and is Limited in Scope**

The study conducted by bmmtestlabs 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.

**3. The NIGC Needs to Accurately Assess the Cost of the Proposed Facsimile Definition, the Proposed Technical Standards and the Recently Released Alternative Classification Standards 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 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, we understand that because no game currently meets the requirements of the proposed Technical standards, they alone would cost an additional \$1 - \$2 billion to implement. Prior to moving forward, the NIGC should complete its economic analysis of the proposal by assessing the impact of these rules. To the extent that the NIGC seeks to go forward with its alternative classification proposal, it should assess its economic impact as well.

**4. 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 viable 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.

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 object to Class II game

certification. 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 such as this one 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.

Sincerely,

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