2 with that same sincerity and we will consider

3 very seriously what you have said.

4 We may have some questions we'd like to

5 submit to you following this proceeding and if

6 you would please respond to those, we would be

7 much appreciative.

8 So, at this time, we will thank this

9 panel and we'll reconvene here with the other

10 panel in five minutes, about 11:15, and be ready

11 to proceed. So, we'll break for just a couple of

12 minutes.

13 (Recess.)

14 CHAIRMAN HOGEN: I think this is the

15 first time I've ever used a gavel. It's kind of

16 fun.

17 Okay. We are moving now to Panel 2.

18 Panel 2, I guess, is kind of a mixed bag in that

19 there isn't necessarily any common ground between

20 the two groups that we have represented here, but

21 because of the time constraints and so forth,

22 this was a good place to put both groups.

1 We have State Governments represented as
2 well as the Testing Labs that might participate
3 in the process as included in our proposal. We
4 have from the Conference of Western Attorneys
5 General Tom Gede, the Executive Director of that
6 conference. We have from the Washington State
7 Gaming Commission Sharon Tolton-Reese, the Deputy
8 Director there, and then on the Lab side, we have
9 Nick Farley of Nick Farley and Associates, and
10 Drew Pawlak of BMM Testlabs, and we'll begin with
11 Tom Gede of the Conference of Western Attorneys
12 General.
13 Panel 2 - State Governments and testing Labs
14 MR. GEDE: Good morning, Mr. Chairman
15 and Commissioner Choney. My name is Tom Gede,

16 and I'm the Executive Director of the Conference

17 of Western AGs or CWAG. CWAG is an association

18 of Attorneys General of 18 Western states and

19 Pacific Island territories.

20 I'm pleased here to provide some limited

21 views on the proposed rules for the definition of

22 electronic or electromechanical facsimile and

1 classification standards for Class II gaming

2 activities played with computer, electronic or

3 other technologic aids.

4 The Western Attorneys General will be

5 filing comments by next week expressing their

6 views on the proposed rules and my comments today

7 reflect some preliminary perceptions before the

8 filing of the comments next week.

9 The efforts of the National Indian

10 Gaming Commission to adjust this definition and

11 to provide the classification standards are, in

12 our view, particularly commendable. You may not

13 be wanting the support but we'll provide you with

14 the support. We think that some modifications in

15 the proposals might be appropriate; otherwise,

16 the Commission, I think, should be supported in

17 its effort to make these important regulatory

18 changes.

19 Preliminarily, let me just note that the

20 issues before the Commission are of great

21 significance to the states. The ability to

22 accurately distinguish between technologic aids

1 and electronic or electromechanical facsimiles is
2 important to the states precisely because the
3 latter devices, along with slot machines of any
4 kind, are by definition Class III gaming
5 activities requiring a tribal state compact for
6 their lawful use on Indian lands.
7 Paramount here is the intent of Congress
8 and it seems to me that Congress didn't intend
9 Class II gaming to be a hammer to push states
10 that haven't resolved their compacting over Class
11 III gaming. Congress intended Class II gaming,
12 quite literally, to be a grandfathering of
13 certain games, including with the use of those
14 aids.
15 If Congress wanted bingo to be played as
16 an electronic facsimile or as a slot machine of
17 any kind, it would have just put it in Class III
18 or it would have provided an exception for them
19 in Class II and made that explicit. Instead, it
20 provided you with this difficult task you now
21 face of making a clear distinction between
22 technologic aids and electronic or

1 electromechanical facsimiles.

2 The areas I'll cover in this testimony

3 provide the following suggestions for

4 modifications to the proposed rules. First, the

5 proposed definition of electronic or

6 electromechanical facsimile is an improvement

7 over the 2002 definition.

8 As you know, the states opposed the 2002

9 rewrite of the definitional regs and the

10 decoupling of the facsimile from the Johnson Act,

11 but given the 2002 definition, these

12 improvements, particularly in the addition of the

13 word "fundamental" in describing the

14 characteristics of the game incorporated into

15 electronic or electromechanical facsimile,

16 constitutes an improvement in our view.

17 However, the word "all," A-L-L, should

18 be deleted in the proposed definition in

19 Subparagraph 5028(b)(1) in describing those

20 fundamental characteristics as it is internally

21 inconsistent with Paragraph (a)(1) and it opens

22 it up to an argument that incorporating anything

1 less than all fundamental characteristics makes

2 the game a technologic aid and not a facsimile.

3 Second. In the same proposed

4 definition, in Subparagraph (b)(2), the language

5 "rather than broadening participation among

6 competing players" should be deleted, so that the

7 description of when bingo, lotto and other games

8 similar to bingo are facsimiles should end where

9 it states "an element of the game's format allows

10 players to play with or against a machine."

11 Preferably, it would read "the element

12 of the game's format allows players to play with

13 or against a machine that applies an element of

14 chance to win or lose the game," but I address

15 that further in the written testimony.

16 Third. The Class II classification

17 regulations, where it provides for a process for

18 approval, introduction and verification of

19 technologic aids, it should also provide a

20 notification procedure to the states or the state

21 where the gaming is proposed to occur and a

22 process whereby a state is allowed the

1 opportunity to appeal a finding of the Commission
2 that a particular device is a technologic aid.
3 Finally, with respect to the remaining
4 classification proposed regulation, we generally
5 support the many descriptions that have been put
6 in these proposals. We support the restriction
7 on auto-daubing. We support the tangible medium
8 for pull tabs. We are a little confused about
9 some of the prize structures, so that, for
10 example, in ante-up game, it doesn't appear to us
11 to be a classic form of bingo, and we urge that
12 the Commission thoroughly and carefully review
13 the prize structure in such a way that a game
14 isn't being converted into a lottery, a lottery
15 that would otherwise be Class III, and I'd be
16 pleased to answer other questions.
17 CHAIRMAN HOGEN: Thank you, Mr. Gede.
18 Ms. Tolton-Reese?
19 MS. TOLTON-REESE: Thank you. Good
20 morning. If it's possible to be more unpopular
21 than you, sir, I suppose I'm potentially on the

22 hook here being from a state agency and a

1 regulator no less, but here we go.

2 Chairman Hogen, Associate Commissioner

3 Choney, Commission staff, and honored tribal and

4 state representatives, ladies and gentlemen,

5 thank you for the opportunity to testify on

6 behalf of the State of Washington regarding

7 proposed rules for Class II electronic devices.

8 My name is Sharon Reese, and I'm a

9 recent new hire with the Washington State

10 Gambling Commission as the Deputy Director.

11 However, I am returning after 10 years working in

12 another state agency.

13 The Washington State Gambling Commission

14 has been the negotiator on behalf of the governor

15 for Class III compacts with tribal governments in

16 the State of Washington for the past 15 years.

17 Twenty-nine unique federally-recognized tribes

18 are within Washington boundaries and there are 27

19 compacts with 24 operations currently open for

20 business.

21 Recent counts indicate that we have

22 about 16,281 machines in play in Class III and in

1 Class II, we have about 1,093.

2 Our interest in being here today is to

3 provide a state perspective with regard to the

4 rules for Class II and Class III machine gaming

5 and our thoughts regarding the challenges facing

6 us all in the coming months.

7 We are confident that it was not the

8 intent of the drafters of IGRA or the current

9 wish of the NIGC in the promulgation of rules to

10 allow misrepresentation of games or to submit

11 language distortions that effectively blur the

12 distinctions between Class II and III machines.

13 To do so precludes effective tribal, state and

14 federal regulation and subsequently undermines

15 public confidence which can do damage to the

16 business of gambling.

17 The Commission must continue to show

18 that it is willing to enforce those provisions

19 provided by IGRA with rules that enforce a bright

20 line standard for both regulatory staff and

21 tribal business leaders between the Class II and

22 III devices. Those machines not meeting the

1 specific requirements under IGRA's definition and
2 the Commissioners' clarifying rules should be
3 required to be removed or request to be
4 negotiated under the terms of the Class III
5 compact.
6 IGRA provided clear recognition of both
7 the tribes' and the states' rights to negotiate
8 these high-risk and more profitable types of
9 activities.
10 No one disputes that the income from
11 tribal gaming has provided some phenomenal
12 programs and improvements in Indian Country. In
13 Washington, there's tremendous pride in the
14 employment, educational, health, social programs
15 and much more that tribal governments have
16 prioritized with the funds from gaming
17 enterprises.
18 Local communities and the surrounding
19 areas have also flourished and benefitted from
20 the additional employment and the associated

21 money circle of spending.

22 The NIGC rules separating and

1 identifying Class II from Class III machines are

2 something that the states have a very strong

3 interest in. It has been a concern in our state.

4 Even though we all knew that these rules were

5 coming, it appears that purchases of gray area

6 machines continued, even when the draft

7 regulations were already being prepared to be

8 posted.

9 Some enterprises may have been premature

10 and now they must potentially re-evaluate their

11 economic plans, but there is still a very

12 positive future for tribal gaming with

13 appropriate NIGC rules, oversight and the tribal

14 gaming agency regulation in Class II.

15 Over time, adjustments will continue to

16 be made to accommodate changes in the law,

17 technology, the industry, and our varied

18 approaches to regulation, but for now, we are at

19 this point in time, with this set of

20 circumstances, many of us doing the best we can

21 in our own environment to maintain integrity and

22 confidence.

1 The Washington State Gambling Commission

2 has been a nationally-respected gambling

3 regulatory agency since 1974 and worked closely

4 with colleagues at the NIGC since its early

5 development and has observed its growth over the

6 many years since.

7 A regulator's role, however difficult,

8 is to provide simple clarity to their

9 administrative regulations in support of their

10 authorizing law.

11 To summarize, we believe that strong

12 regulation and control, accompanied by fairness

13 and consistency in the implementation of rules

14 and regulations, is critical to the success of

15 gambling regulatory agencies.

16 These rules make some progress but do

17 not fully implement and support IGRA's guiding

18 principles in strictly defining the classes of

19 gaming on Indian lands. They may not have gone

20 far enough and they lack the simplicity for a

21 user. We are concerned that the NIGC may find

22 themselves spending a great deal of time

1 interpreting their rules as a result.

2 The Commission may have significant

3 difficulty fully enforcing these provisions as

4 proposed and needs appropriate resourcing,

5 staffing and budget support to be effective and

6 engender the confidence in this complex

7 environment.

8 In Washington State, the tribal gaming

9 agencies work diligently to maintain an

10 independent regulatory oversight of gambling

11 activities. Our government-to-government

12 relationships continue to improve over the years

13 of working together and sharing common goals in

14 Class III environments through our tribal state

15 compacts.

16 Without agencies to make the tough and

17 sometimes unpopular decisions, there is much more

18 to risk to the industry as a whole with those who

19 take advantage of unclear regulation, lack of

20 adequate or knowledgeable enforcement or outright

21 illegal activities. Working together, the

22 business enterprise and the regulator may not

1 always see eye to eye but there are some basic

2 values I'm happy to say most of us aren't

3 compromising on.

4 On behalf of our commissioners at the

5 Washington State Gambling Commission, Director

6 Day and our staff, thank you for the opportunity

7 to be here. As regulators, whether you are

8 tribal, state or federal, we can all appreciate

9 that there are inherent difficulties in

10 maintaining an independence and a balance between

11 public, private and government interests in the

12 area of gambling.

13 Thank you.

14 CHAIRMAN HOGEN: Thank you. And now for

15 something completely different, we will turn to

16 those folks that do testing for a living.

17 Nick Farley?

18 MR. FARLEY: Thank you. Good morning.

19 I'm Nick Farley, President and Founder of Nick

20 Farley and Associates, based in Ohio. We are a

21 regulatory compliance testing and consulting

22 company, serving the gaming and amusement

1 industries.

2 My company and myself personally have

3 been working closely with the NIGC for over eight

4 years. I have been involved in the test and

5 evaluation of electronic gaming devices and

6 systems since 1987, when I started my career as a

7 regulator with the New Jersey Division of Gaming

8 Enforcement in Atlantic City.

9 I'm honored to have been invited to

10 speak on this panel before the National Indian

11 Gaming Commission. Our company has prepared a

12 few reports for the NIGC regarding Class II bingo

13 systems. So, the classification standards are

14 something near and dear to our hearts.

15 I would like to start by stating simply

16 that as an independent testing laboratory, we are

17 able and willing to test products for compliance

18 with any classification or technical standard

19 adopted by the NIGC.

20 The draft of these standards that is

21 under consideration is plausible and testable.

22 However, my experience in compliance testing sees

1 some issues in the proposed standards that will
2 most likely cause debate. In fact, some of the
3 items included in these proposed standards
4 contradict some of the current NIGC advisory
5 opinions on Class II bingo systems.
6 With that said, with regard to bingo,
7 Sections 546.4, 546.5 and 546.6 of the proposed
8 classification standards establish the following
9 requirements that I believe would cause some
10 consternation from the tribes and the gaming
11 industry.
12 These requirements include the
13 following: that the game of bingo include the
14 electronic card but excluding any alternative
15 displays shall fill at least half of the total
16 space available for display; that a message on
17 the game terminal read this is a game of bingo or
18 this is a game similar to bingo in two-inch

19 letters or larger; that the value of a prize be

20 no less than 20 percent of the amount wagered by

21 the player on each card in at least one cent;

22 that the player has the option to not view the

1 alternative display and play using only the

2 electronic card display; that a player be

3 permitted to catch up only when buying for the

4 game-ending pattern and be prohibited from

5 catching up for any other prize; that the maximum

6 amount of numbers or characters to be revealed

7 during the first release is one less than the

8 number required for a game-winning pattern,

9 commonly referred to as the N minus 1

10 requirement; that the quantity of numbers in the

11 second or subsequent release not extend beyond

12 the quantity of numbers necessary to form the

13 first eligible game-ending pattern on a card in

14 play in the game.

15 Most of the items that I've just listed

16 appear to be in contrast with the operation of

17 systems operating in the field with a favorable

18 NIGC advisory opinion.

19 I can envision manufacturers and tribes

20 voicing concern that many products that are

21 currently and legally in use will no longer

22 comply with some of the sections of these

1 classification standards.

2 With regard to pull tabs, Section

3 546.7(c) states that the technologic aid may also

4 read and display the contents of the pull tab as

5 it is distributed to the player. The results of

6 the pull tab may be shown on a video screen. The

7 unfortunate side effect of this video pull tab

8 requirement is that it's my understanding that

9 this method is patented. Thus, this requirement

10 limits competition and perpetuates a monopoly.

11 To quickly wrap up my presentation, I

12 realize that adopting classification and

13 technical standards for Class II games and

14 systems is a daunting task. There is no one size

15 fits all solution. There will be criticism of

16 any standard that is adopted because, quite

17 frankly, there's no solution that will please

18 everyone.

19 I realize that technology has blurred

20 the lines between Class II and Class III games.

21 I empathize with law enforcement agencies tasked

22 with deciding what is legal and illegal. Ten

1 years ago, it was safe to assume that if reels
2 were present, it was a slot machine. Now, Class
3 II gaming systems play bingo and reveal spinning
4 reels as an alternative entertaining display
5 which is based entirely on the bingo outcome.
6 This is a law enforcement nightmare, to be able
7 to decipher if the spinning reels are derived
8 from a bingo game or if the spinning reels are
9 the game in its entirety.
10 It is my belief that IGRA did not intend
11 to limit technology in the play of bingo. The
12 systems currently in play and soon to be released
13 to the public are an ingenious way to present
14 bingo to adults that are enticed by the thrill of
15 spinning reels. Reports that I have received
16 indicate that these games are a viable and
17 lucrative means for tribes to derive significant

18 sums of revenue if they do not have a Class III

19 compact or have a limited Class III compact.

20 Please do not take my comments as a

21 criticism of the proposed classification

22 standards. As I stated in the beginning of my

1 presentation, our laboratory is willing and able

2 to test to these standards if they are adopted.

3 Based upon my experience in gaming,

4 including Class II gaming, I consider the

5 sections of the classification standards that I

6 discussed as areas of concern for tribes and

7 manufacturers and I just want to put these

8 matters on the table for discussion.

9 I thank you for this wonderful

10 opportunity to speak to you today, and I welcome

11 you to contact my office to discuss these matters

12 at greater length.

13 CHAIRMAN HOGEN: Thank you. Mr. Pawlak?

14 MR. PAWLAK: Good morning, Mr. Hogen,

15 Chairman Hogen and Commissioner Choney.

16 Thank you for inviting BMM Testlabs to

17 participate in the public hearing on the proposed

18 Class II definition of classification standards.

19 The BMM Testlabs is an independent test

20 lab for the global gaming industry that has been

21 in operation since 1982. BMM started in the

22 strictest regulatory market in the world,

1 Australia, and has since expanded to provide

2 coverage for regulators and the industry in every

3 market worldwide. BMM's corporate headquarters

4 are now based in Las Vegas, Nevada.

5 In April 2004, BMM was contracted by the

6 National Indian Gaming Commission as the

7 technical consultant to assist in drafting

8 technical standards for Class II gaming as

9 described by the Indian Gaming Regulatory Act.

10 In this context, it is very important to

11 draw a careful distinction between policy

12 requirements and business rules as determined by

13 government regulatory authorities and technical

14 compliance standards designed to uphold those

15 regulatory requirements.

16 In our role as an independent test lab,

17 it has always been BMM's position that

18 policymakers and appropriate stakeholders of the

19 industry should work together to develop the

20 policy, rules and requirements for the industry.

21 These regulations or rules are or in our view

22 should be generally developed from a public

1 policy and/or legislative point of view. This is
2 a legal policy and process.
3 We are technologists. We do not believe
4 it is our role to advocate a policy position in
5 this context. Once the policy and business rules
6 are clearly defined, then at that point,
7 technical standards designed to ensure compliance
8 with those objectives and requirements must be
9 developed. These standards should explain and
10 govern how specific products and technologies
11 must perform in order to be compliant.
12 If the regulatory framework and
13 requirements are clearly defined, technical
14 standards should be reasonably easy to develop
15 within that framework.
16 Generally, the technical standards have

17 been well accepted by the various stakeholders.

18 However, there are certain portions of the

19 recently-published version of the technical

20 standards which have caused concern among

21 segments of the stakeholder community. These

22 questions or concerns do not arise out of the

1 technical standards themselves but rather the

2 policy and the classification standards and

3 requirements that we're meeting here today about.

4 It is our view that the specific

5 technical standards in question clearly define

6 the technical requirements for how the technology

7 and equipment in this category is to be designed,

8 how it must function, how it must communicate and

9 report, how it must account for the game plan

10 events. These standards further outline the

11 security integrity levels required for every

12 component. These are not dissimilar to many

13 other technical standards used throughout the

14 global gaming industry.

15 From these standards, we have been able

16 to develop test scripts to test, verify and

17 certify the type of technology used in this

18 sector, and we'll be able to confidently make

19 recommendations to the appropriate regulatory

20 authorities.

21 It is important to note, while BMM will

22 evaluate the technical standards and develop

1 these test scripts to ensure the gaming equipment

2 systems and software does in fact comply with the
3 adopted technical standards, we will not make or
4 recommend a policy determination.
5 If there's question on the meaning or
6 intent of a certain technical standard, which by
7 nature will be a policy question, we refer these
8 questions back to the regulatory authority for
9 formal interpretation, clarification or opinion.
10 We would then adjust our technical test scripts
11 and processes to ensure they are consistent with
12 the policy requirements and objectives.
13 We submit all findings and
14 recommendations to the approval for the specific
15 regulatory authority before any given
16 jurisdiction. As an independent test lab, we are
17 very conscious that we are not ourselves a
18 regulatory authority.
19 We want to reiterate in BMM's view, that
20 our role as an independent test lab is to certify
21 the equipment and software that's used by the
22 industry complies with the technical standards

1 that are written to uphold the regulatory and
2 policy requirements and objectives in a given
3 regulatory authority.
4 Again, it is not our role to weigh in on
5 what should or should not be the policy outcome
6 but rather help create and test against technical
7 standards to ensure compliance with the
8 regulatory authority's policy objectives.
9 Given this, it would be inappropriate
10 for us to comment on classification standards
11 here today. This is a policy and legal question
12 and as such outside our purview. We are not a
13 stakeholder in the overall outcome of this
14 process. We do not represent a sovereign tribal
15 nation, any particular gaming equipment or system

16 manufacturer. We are not a distributor or an

17 operator, and as noted above, we are certainly

18 not the regulator. These are the constituencies

19 who, quite legitimately, have an interest and

20 stake in the outcome of these procedures.

21 Our position as an independent test lab

22 as an overall process is to test equipment to a

1 known accepted technical standard and remain

2 unbiased in the process. The need for any test

3 lab to remain independent is essential to the

4 overall integrity of this process and the health

5 and accountability of the overall industry and

6 the need to remain independent requires that we

7 do not have a vested interest or an agenda.

8 For an independent test lab to take such

9 an advocacy position undermines the credibility

10 and integrity of the organization. In this

11 context, BMM will not offer an opinion or

12 advocate a position for or against the published

13 classification standards.

14 CHAIRMAN HOGEN: Thank you. Before we

15 turn to public questions or comments, I would

16 like to ask the lab folks a couple of questions.

17 Mr. Farley, if NIGC would adopt what's

18 on the drawing board or something like it, I

19 think it would be the first time we would in

20 effect have a set of standards that we would ask

21 an outsider, a lab, to test.

22 Do you currently go through any similar

1 exercise with other regulatory bodies or
2 governments and, if so, can you describe how the
3 process works?
4 MR. FARLEY: Yes, certainly. Other
5 regulatory bodies have adopted technical
6 standards or classification standards or rules or
7 regulations, whatever you want to call them. We
8 use them as guidelines to write our own test
9 scripts and test plans.
10 Once those test plans are in place, we
11 can, you know, begin testing. In fact, sometimes
12 we can test without the test plans, provided that
13 the standards are clear enough.
14 It is commonplace that games will be
15 designed that don't quite fit within the box of
16 what the rules, regulations or standards are, and
17 in those instances, we rely upon the regulatory
18 agencies to work with us cooperatively to try and
19 get answers to questions on games that might not
20 fit squarely within the box.
21 CHAIRMAN HOGEN: Is there then a

22 dialogue between the tester and the regulatory

1 agency before the matter comes to a conclusion

2 MR. FARLEY: Absolutely. Absolutely.

3 We would intend to work cooperatively with the

4 NIGC when standards are adopted. In fact, we

5 would welcome you to come to our lab and work

6 with us, so that as we go through our process, we

7 can discuss what it is, how it works, and kind of

8 bounce it off of each other.

9 CHAIRMAN HOGEN: One of the concerns

10 that NIGC had as we drafted what we've drafted so

11 far was that we wanted to avoid NIGC becoming a

12 bureaucratic bottleneck in terms of getting out

13 opinions or whatever.

14 I realize this is a very hypothetical

15 question, but if something like what we now have

16 on the drawing board comes to pass and suddenly

17 there is a send it to the lab and get it

18 certified requirement, how is the capacity of the

19 lab world situated to deal with something like

20 that, and is it realistic to take an approach

21 like this, in your view?

22 MR. FARLEY: I think it's realistic to

1 take the approach. Someone before the panel

2 started this morning asked me a similar question

3 as far as, you know, lab capacity and if all this

4 goes through, how long would it take to get

5 something through the lab?

6 What I see on the table I don't think

7 would fall outside of our, you know, standard 30-

8 day turnaround time. Of course, you know,

9 getting inundated with everybody all at once, you

10 know, eventually creates a queue, but, you know,

11 I think that we would have the resources to

12 handle that, and I think our competitors would

13 probably comment likewise, that, you know, it

14 would be realistic for us to be able to handle

15 it, and I think that the three labs that have

16 been involved in this since the beginning have

17 enough experience in, you know, cooperation with

18 your agency that I think we can make this work.

19 CHAIRMAN HOGEN: Mr. Pawlak, would you

20 care to comment on those two areas; that is, do

21 you deal with similar frameworks and what about

22 the capacity and the turnaround time and so

1 forth?

2 MR. PAWLAK: Yes, we definitely deal

3 with similar frameworks. It's a pretty typical

4 framework that you find in most regulatory

5 bodies. There's certainly dialogue that goes on

6 with questions, you know, and it varies from

7 jurisdiction to jurisdiction, you know, the

8 interpretation of what is the elements of a game,

9 you know, when the game starts and when it ends

10 and are there bonus features or bonus mystery

11 features, jackpot features, as they go on, will

12 vary from regulatory body to regulatory body.

13 So, dialogue is very normal. Usually

14 there's a point of contact and what we do is we

15 keep a database and when those questions were

16 answered who answered them and hopefully there's

17 one designated point of who determines it.

18 Some regulatory bodies require a

19 committee decision. Those are obviously much

20 longer decisionmaking process for simple

21 questions, but, you know, we certainly work

22 within those boundaries.

1 I think the timeline, the six months, is

2 going to be very difficult for the entire

3 industry to comply with. Development is not as,

4 you know, -- they've been published and they've

5 been out there, but the timeline is tight.

6 If you look at any sort of new platform

7 and development of that, it's sometimes months

8 between iterations as they make their tweaks and

9 get them tested and reverified and, you know, one

10 component of software will break another

11 component of software that's completely

12 unrelated.

13 If you think about, you know, how many

14 manufacturers are involved, the different

15 departments, other projects and other, you know,

16 areas of the market that they work in, dictating

17 time and resources to this could make that six

18 months very, very challenging.

19 COMMISSIONER CHONEY: I have a question

20 of Mrs. Reese.

21 How would the state react when you

22 report to them that your field investigators come

1 back and report to you that they go out and make

2 a site visit and they'll look at a machine and

3 they can't tell the difference whether it's a

4 Class II or Class III?

5 MS. TOLTON-REESE: I think that's one of

6 the difficulties that we're trying to point out.

7 I think in the rules and regulations, it should

8 be clear enough that an agent, whether it's

9 tribal, state or federal, should be able to look

10 at a machine and be able to tell without having

11 to tear it apart.

12 CHAIRMAN HOGEN: As with the previous

13 panel, I would hope that you folks would be

14 responsive to questions that the Commission might

15 want to submit following this testimony.

16 With that, we'll say thank you very

17 much. Wait a minute. We're going to get public

18 comments and questions.

19 So, at this point, are there comments or

20 questions that pertain to these areas, the

21 viewpoint of the states, the viewpoints of the

22 lab testers, or how it all comes together?

MS. STEVENS: I'm not sure what I just signed, but I hope when I get home, my firstborn is there.

My question is to Sharon Reese. My name is Tracie Stevens. I'm with the Tulalip Tribes of Washington.

There was a comment that you made in your testimony that there was some outright illegal activity going on. What do you mean by that comment? Are you finding that -- is the Gambling Commission finding that there's Class II -- proclaimed Class II machines that are really Class III machines?

I mean, with the commissioner's question about not being able to pass the smell test on site, --

MS. TOLTON-REESE: I think my script read that there was the potential for illegal activity without clear regulation.

20 MS. STEVENS: Well, in speaking to my

21 council member last night, the question he wanted

22 me to ask was is there some evidence that there's

1 a problem that the Gambling Commission feels a

2 need to speculate as to whether there's a Class

3 II/Class III blurry line that we haven't

4 addressed with the NIGC or through our own gaming

5 agency?

6 MS. TOLTON-REESE: I think in terms of

7 my general comments, speaking from the state

8 perspective as a whole, the reason there are

9 agencies like ours is just to prevent those kinds

10 of problems, and the testimony and the records

11 that I've been reading reflect on a lot of the

12 things that the NIGC has already responded to in

13 terms of illegal activities.

14 So, it was a very general comment, not

15 specifically speaking to anything in Washington

16 State. Clearly, with as many compacts as we have

17 negotiated with tribes that are successfully

18 opened and operating, we've had very limited

19 issues related to any negative activity with

20 regards to gambling.

21 MS. STEVENS: Okay. Thank you.

22 MS. TOLTON-REESE: You're welcome.

1 MR. BOON: Still good morning. My

2 name's Doug Boon. I'm the CEO of Little Creek

3 Casino Resort. I work for the Squakin Island

4 Tribe in Washington State.

5 I wanted to address the question that
6 Commissioner Choney had asked of Ms. Reese
7 earlier. It's my belief as an operator and
8 representing the tribe that I represent as an
9 operator that the courts have made a very clear
10 decision at this point what constitutes Class II
11 gaming and what constitutes Class III gaming and
12 that there is no blurry line if they're operating
13 the Class II machines today, the ones that have
14 been approved by the NIGC and if they follow
15 those distinctions that have already been laid
16 out by the courts.
17 What we see here is an attempt to change
18 the format of the gaming that we have currently
19 that's authorized and has been authorized and
20 upheld through various litigation, a fundamental
21 change to those things in order to make that
22 classification different than it is today, and I

1 really don't think that if you follow the rules
2 as they're established right now today, there is
3 no blurry line about whether or not it's a Class
4 II game or whether it's a Class III game or
5 whether it's a bingo game or whether it's not.
6 There's an identifiable bingo screen
7 that must appear on the thing. I mean, there's a
8 number of rules that must be followed, and any
9 person who knows anything about Class II or Class
10 III electronic gaming, as long as the games are
11 ones that are approved, can clearly see those
12 distinctions and there really is not a blurry
13 line, and I think that that definition is kind of
14 being thrown out here, and it's not one that's
15 adequate to cover where we're at.
16 So, thank you.
17 CHAIRMAN HOGEN: Thank you. And if I
18 just may respond to that comment for a moment.

19 The courts have addressed basically two

20 different formats or devices. One was the Mega

21 Mania bingo game, and it was an electronic player

22 station that interconnected players sometimes at

1 different locations around the country, and you

2 couldn't start that game until you had 12 players

3 to play and they had four cards on their device

4 and they had to participate in that they had to

5 chip up or ante up or decide if they were going

6 to ante up to continue to play or if they wanted

7 to drop cards, so forth, and it took 60-90-120

8 seconds to play those games.

9 The games that are in play as Class II

10 around many places in the country right now are

11 played almost instantaneously; that is, you push

12 the button and in a heartbeat, the game is over.

13 The game that we would permit under

14 these proposed regulations would permit as few as

15 two players to play and permit it to be played in

16 just over eight seconds. I think that's a

17 dramatic difference from what the court approved,

18 and I think it moves in the directions the tribes

19 would want us to go; that is, to be more

20 flexible, and I realize, and we're going to hear

21 from the lawyers here in a minute, that we can

22 argue about, well, what conclusions can you reach

1 from what the courts have said, but to say that

2 the line is already clear, I so wish that were

3 true.

4 I would have spent the last three years

5 a whole lot different than I did spend it, if

6 that were true. We're trying to get there, and I

7 understand there are different points of view,

8 but, you know, clarity, I continue to think is

9 needed, and not that I'm dismissing your view or

10 your comment, but I want you to understand, you

11 know, some of our concerns.

12 MR. BOON: Thank you.

13 CHAIRMAN HOGEN: Charlie?

14 MR. LOMBARDO: Yes, sir. Charlie

15 Lombardo, Senior Vice President, Gaming, for

16 Seminole Tribe of Florida.

17 My question's for Sharon Reese. Could

18 you clarify for me, please, when either you or

19 one of your agents go out into the field, are you

20 saying that you cannot today distinguish the

21 difference between the compacted games in

22 Washington and the Class II games?

MS. TOLTON-REESE: I can honestly tell you we don't spend a lot of time in Class II. That's not our jurisdiction at all. What we're concerned with is some of the games that have been converted, the games that we have been discussing that we had no issue with initially and now are being converted to games that don't look like bingo anymore.

So, we believe that some of those games potentially should be discussed as compacted issues, yes.

MR. LOMBARDO: So, you're saying --

MS. TOLTON-REESE: But we haven't spent a lot of time looking at them. We do have a lab and our lab looks at games occasionally, but for the most part, we're looking at Class III games.

MR. LOMBARDO: So, you're saying then

18 that you have not tried to distinguish the

19 difference between the two, haven't gone out to

20 look and see if there's a difference?

21 MS. TOLTON-REESE: I think our lab has

22 looked at them, but I don't know that our agents

1 have spent a lot of time going into Class II and

2 Class III and making comparisons. I don't think

3 our tribes -- I'm not aware that it's been an

4 issue with our tribes yet. We're just trying to

5 preclude that.

6 MR. LOMBARDO: Okay. Thank you.

7 MS. TOLTON-REESE: You're welcome.

8 CHAIRMAN HOGEN: Yes, sir?

9 MR. SMITH: Yeah. I'm Jahn Smith,

10 Director for the Stillaguamish Gaming Commission.

11 To help Sharon Reese out here just a

12 little bit, I'm from Washington State, and the

13 Washington State agents do do a very decent job.

14 They have gone through and walked through our

15 Class II areas to define whether or not the bingo

16 card is actually placed on that machine. So,

17 they are doing a very good job.

18 Washington State Gambling Commission and

19 ourselves work very, very closely. A lot of our

20 regulatory issues that we have with our Class

21 IIIs, we duplicated everything that we have for

22 our Class II machines.

1 I believe that the NIGC needs to take a

2 look and put some faith into the regulatory

3 bodies that we do have in place right now as far

4 as our tribal gaming offices.

5 I guess I look at the proposals that the

6 NIGC is trying to put forth and I can't see to

7 where the machine's broken, you know. If the

8 machine's broken, I can understand fixing it, but

9 why fix it now if there's nothing broken?

10 The regulators, as far as the

11 Stillaguamish Gaming Commission goes, we are able

12 to understand, you know, the difference between a

13 bingo machine, the card's there, it is considered

14 a Class II.

15 I guess you might say -- actually, a

16 rose by any other name is just a rose. Bingo is

17 just bingo, whether it's chiseled out on a rock

18 with pebbles placed on it or whether it has an

19 electronic facsimile that's attached to it. It's

20 still just bingo.

21 I think the NIGC's trying a little too

22 far in trying to establish that this is something

more than it is.

Thank you.

CHAIRMAN HOGEN: Thank you. Yes, sir?

MR. BUFFALO: Henry Buffalo. I represent the Fond du Lac Band of Lake Superior Chippewa in Minnesota.

Hey, Tom. I couldn't let you get off that easy.

I just want to address a couple comments that Tom had made. It's interesting that Tom is sort of twisting this to make the states victims of the Class II technological advancements that tribes have actually had to come up with as a result of states' refusals to negotiate for Class III machines, and I think, Tom, the hammer that you spoke of is not the Class II devices.

17 The hammer that you forget about is the

18 states' argument that they are immune from suit

19 when it comes to the question of whether or not

20 they negotiated in good faith or failed to

21 negotiate under the IGRA.

22 Now, you remember those discussions and

1 the IGRA was a compromise. You remember that the

2 states wanted in after Cabazon. After Cabazon,

3 they said the states were completely out. The

4 IGRA was a compromise and immediately after its

5 passage, it wasn't the tribes who began

6 developing Class II alternatives, it was the

7 states who brought the lawsuit claiming immunity

8 from suit, even though they agreed that they

9 would participate in the IGRA and negotiate with

10 tribes over Class III. That's what they claimed

11 was their interest.

12 So, the hammer, Tom, is not Class II

13 innovations. The hammer was the immunity suit

14 that the states brought, leaving the tribes with

15 no other opportunity to force states to

16 negotiate. The Act knew historically that tribes

17 and states would not be able to figure this out

18 on their own and they needed some independent way

19 to do that.

20 Unfortunately, the states prevailed. We

21 don't have that way and that's why we have

22 innovations. I don't believe there's any

1 language, and I know for sure that the intent of

2 the Act, as a participant in the drafting and the

3 lobbying of that, did not seek to restrict the

4 tribes. Instead, what they wanted to do was they

5 wanted to let the marketplace decide that.

6 I think our concern -- we forget that as

7 regulators. Our concern is, as the guy from the

8 lab said, with respect to those machines, is how

9 they function, how they're designed, how they

10 communicate, and how they account. That's what

11 we need to focus in on, not what the type of the

12 game is or the innovation that has developed as a

13 result of the lack of other opportunities.

14 Thank you.

15 CHAIRMAN HOGEN: Do you care to respond,

16 Mr. Gede?

17 MR. GEDE: If I may. Thank you. Thank

18 you, Henry.

19 I don't disagree with you entirely, and

20 I would point out, though, I think that it's a

21 vast majority of states that have consented to

22 suit in federal court, and it's a small, very

1 small minority of states that have maintained
2 their effort to hold on to sovereign immunity,
3 and I frankly think the states should sit down at
4 the table, and I frankly think they should waive
5 their sovereign immunity and negotiate in good
6 faith. That's their obligation, really, not only
7 in federal law but given the landscape, moral,
8 legal and the like, to sit down with the tribes
9 and work these things out.
10 But the technological issues, I think,
11 are going to either have to be resolved as best
12 they can by the NIGC or by Congress because
13 Congress provided for a Class II, but it also
14 provided that an electronic or an
15 electromechanical facsimile of a game is Class

16 III. So, the Commission has stuck with the

17 difficulty of making that distinction, but it

18 can't ignore it and just assume that bingo,

19 however played, is Class II. The law just

20 doesn't provide for that.

21 CHAIRMAN HOGEN: One more question here

22 before we break.

1 MR. PARKER: Gentlemen, it's a two-part

2 comment.

3 The first one is regarding the machine

4 certification. Our tribe feels the machine

5 certification process does not afford due

6 process. The NIGC gives itself sole authority to

7 certify the labs who then certify the game

8 classification. This includes no appeal

9 provision for the laboratories and limits the

10 tribe's rights to a hearing.

11 The most egregious part of the

12 certification requirement to our tribe is the

13 Commission objections can be raised at any time.

14 The Chairman or his designee may object to a

15 certification process within 60 days. If no

16 objection is raised within 60 days, the testing

17 laboratory, requesting party or sponsoring tribe

18 may assume the Commission does not object.

19 However, nothing is precluding the Commission

20 from objecting after 60 days, upon a showing of

21 good cause.

22 Again, I'm kind of wondering how I

1 explain this to my tribe, that although we
2 followed all the rules the NIGC had placed forth
3 before and we didn't actually see anything broken
4 with your classification standards, the way that
5 you classified Class 2 games previous.
6 You folks change the rules in midstream
7 and then after setting these far-reaching new
8 rules, a Class II game or system is still not
9 safe after having been subject to the
10 certification standards even after a 60-day
11 objection window.
12 The second point we've got is the
13 effective date and compliance deadlines, we feel,
14 are inadequate to allow the tribes and
15 manufacturers to design, certify and implement
16 games which are compliant. So, I agree with the
17 gentleman at the end of the dias up there.
18 The NIGC should strike Section 546-
19 10(e)(3). Currently, it takes six to eight weeks
20 to deliver a preapproved Class III game in the
21 State of Washington. There's no possibilities
22 that vendors can design a game or system to NIGC

1 specifications, get the submission through the
2 company's own quality assurance program and still
3 get the gaming lab's -- and through the gaming
4 labs within six months.
5 Add the laboratory certification
6 process, its place in the queue and the vendor's
7 ability to get the product out in a current Class
8 II market of over 50,000 machines, you're looking
9 at more than a 16-month window by our standards.
10 NIGC must insert a tiered implementation
11 of regulations that will allow for an orderly
12 transition or change-out of equipment.
13 CHAIRMAN HOGEN: Thank you. And you
14 raise some very valid concerns, and with respect

15 to, you know, where or how can we improve a place

16 for tribes to appeal or ask for review, we're

17 eager to hear specific proposals in that

18 connection.

19 With respect to is there no limit to

20 when NIGC can come along and say, hey, we don't

21 agree with that, I would hope that would never

22 happen, but before it finally happens, I think

1 there would be the dialogue that Mr. Farley

2 mentioned, you know, between the labs and, I

3 guess, the designers and the regulatory body to

4 try to avoid those kinds of situations, but we

5 appreciate the reality and we understand that the

6 time frames may not be what they ought to be, but

7 we're working on that.

8 But to stay on schedule, we are going to

9 wrap this one up. Again, thank you to the panel.

10 We ask the Attorney Panel to assemble. We hope

11 to conclude that so we can then go to lunch and

12 be back with the following panel at 1:55. So,

13 take a couple of minutes to change panelists and

14 then we'll resume.

15 Thank you.

16 (Recess.)

17 CHAIRMAN HOGEN: Throughout the long

18 exercise of meeting with the Tribal Advisory

19 Committee and certainly there have been and will

20 be criticisms of how some of that was conducted,

21 one of the concerns expressed was there are a lot

22 of legal issues here. You're not letting the