September 3, 2009

Via electronic mail: rdowd@sbgamingsystems.com
fax: 519-351-6627
and First Class mail

Robert Dowd, President
The Second Byte
438 McNaughton Avenue West
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CANADA

Re: Fast Track Bingo advisory game classification opinion

Dear Mr. Dowd:

This letter responds to your March 19, 2003 request for an advisory opinion on the classification of Second Byte's (SB) bingo game called "Fast Track Bingo (FTB)." I apologize for the delay in the response. As you are aware, for a lengthy period of time, the National Indian Gaming Commission (NIGC) anticipated that it would issue new regulations for classifying games. In fact, NIGC published, and republished, proposed classification regulations, and during this period, individual classification opinions like this one were held in anticipation of the new rules. However, the proposed regulations became the topic of controversy and were ultimately withdrawn. Since you advise that you remain interested in whether FTB is a Class II game, I am now happy to address the issue. Based on a review by the Office of General Counsel of the information you have supplied, it is my opinion that FTB is a technologic aid to the play of bingo and, therefore, Class II as the term is used in the Indian Gaming Regulatory Act (IGRA) and NIGC regulations.

System Description

FTB is an electromechanical gaming system for facilitating the operation of bingo that is designed to be an alternative to full electronic bingo. The electronics of the system, an advantage for bingo operators, will verify winners and automatically track game transactions such as games bought, floor attendant sales, prize calculation, cards played, and prizes won.

Each FTB unit is connected to a power supply and server where information is collected for reporting from the player stations. Portable, wireless devices used by the operator's staff also record information on selling game credits, cashing players out and

paying winnings and send this information to the server. Another server supports large LCD televisions for game display. The system can be used to play any bingo game ordinarily played in a bingo hall.

Game Play

The player chooses to sit at a station. There are three electromechanical cards available to play on a mounted unit at each station. The cards cannot be changed; the player must accept them or select a different station.

In order to play, a patron must first purchase credits from a floor attendant. The attendant carries a portable electronic device that records the sale and wirelessly loads the credits onto the player's station. This component of the system is a hand-held portable authorizing device or PAD, and the attendants also use it to redeem credits for cash and pay winnings. The players do not directly interact with or even touch the PAD. Rather, the amount of the credit authorized at a player station will be visible to the player in a LCD display.

To enter a game after purchasing credits, the patron uses a white "plus" button and a white "minus" button on the station to adjust the credits he or she is willing to wager in any one game. Once a game begins, a player may not change a bet. The only buttons available to a player during the game are a green "help" button and a red "bingo" call button.

The patron will play one or more of the three standard 5 x 5 bingo cards that are held in an easily viewed position in a lighted card holder, which would seem to make viewing easier. As numbers are drawn from a traditional bingo blower, the player must daub each number on the cards by physically closing a shutter over the number called. At the end of the game, the player simply moves the covering shutter back in its retreat position to set up for the next game.

There are no electronic means employed to daub numbers in this system. In that regard, the system is not essentially different from a hand-daubed paper card. The system replaces the movement of a hand daub with a quick slide to move a shutter over a called number. When a player wins, he or she presses the red button at the station player to announce bingo (and this may be accompanied by the traditional shout of "BINGO!"). Pressing the button informs the ball caller that a player has a win and initiates an electronic verification of the win.

Analysis

IGRA defines Class II gaming, in relevant part as:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo....

25 U.S.C. § 2703(7)(A)(i)(I)-(III). The FTB equipment is designed for fast, easy bingo play and meets all three criteria.

First, games played on FTB are played for prizes on cards bearing numbers. Again, FTB places three 5 x 5 electromechanical bingo cards at each player station. FTB does not employ paper cards.

Second, as the caller calls numbers, a player "daubs" his or her cards by sliding the mechanical shutters and covering any numbers on the cards that match.

Third and finally, players compete to win prizes by being the first person to cover a previously designated arrangement of numbers. FTB, like traditional bingo, requires a minimum of two players for a game to begin. Additional players enter the game if they request participation before the first ball is drawn. The first player to match a previously designated pattern must press the red button at the player station to declare bingo and claim the winning prize.

As bingo played on FTB meets IGRA's criteria for Class II bingo, the only question remaining for its classification is whether FTB is a *technologic aid* to the play of bingo or a *facsimile* of bingo as those terms are used in IGRA. If the former, FTB is Class II; if the latter, it is Class III. It is my opinion that FTB is a technologic aid.

NIGC's regulations define *electronic, computer or other technologic aid*, in relevant part, as any machine or device that:

> (1) Assists a player or the playing of a game;
> (2) Is not an electronic or electromechanical facsimile; and
> (3) Is operated in accordance with applicable Federal communications law.

25 C.F.R. § 502.7. FTB meets the first and third requirements.

FTB satisfies the first requirement because it not only assists the player in playing bingo, it assists the operator as well. It lights the bingo cards making them easily visible; its shutters make numbers easy to cover; and the press of a button allows players to set wagers, get assistance, and declare bingo. For the operator, FTB allows for accurate accounting of bingo by automating all purchases and payouts, and it helps ensure fairness by electronically verifying all wins.

Likewise, FTB satisfies the third element, meeting FCC requirements when operated. Nothing in the documentation provided indicates FTB uses anything other than standard wireless communications. It is therefore reasonable to presume it satisfies FCC requirements for radio emissions.

In order to be a technologic aid, then, FTB cannot be an electronic or electromechanical facsimile of a game of chance, which IGRA makes Class III. The term *Class II gaming* "does not include … electronic or electromechanical facsimiles of any game of chance," 25 U.S.C. §2703(7)(B)(ii), and IGRA defines as Class III all games that are not Class I (which refers to traditional and ceremonial games not relevant here, 25 U.S.C. § 2703(6)) or Class II. 25 U.S.C.
§ 2703(8)

The Commission's regulations define *electronic or electromechanical facsimile*, in relevant part, 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. Courts have adopted a plain meaning interpretation of the term *facsimile* and recognize a facsimile as a game that electronically replicates the characteristics of the underlying game. *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'"), *cert. denied*, 516 U.S. 912 (1995); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 636 (D.C. Cir. 1994)("[a]s commonly understood, facsimiles are exact copies, or duplicates").

For example, *Sycuan* reviewed a wholly electronic pull tab game, one in which the player bought and played pull tabs generated by computer and displayed on a video screen. The Ninth Circuit concluded that this was an exact, self-contained copy of paper pull tabs and thus an electronic facsimile. IGRA's "exclusion of electronic facsimiles removes games from the class II category when those games are wholly incorporated into an electronic or electromechanical version." *Sycuan* at 542-43. *Accord, Cabazon*, 14 F.3d at 636.

By contrast, in *Diamond Game v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), the machine in question, the Lucky Tab II, sold and dispensed paper pull tabs from a roll. The machine also read and displayed the results of each tab, presenting those results in such a way as to resemble a three-reel slot machine. Nonetheless, the paper tabs could be played and redeemed manually. The D.C. Circuit held, therefore, that the Lucky Tab II dispenser was not an electronic facsimile containing all characteristics of pull tabs and thus was not a Class III device, no matter how many bells and whistles it might have. The

"game is in the paper rolls," the court held, and the Lucky Tab II is "little more than a high-tech dealer." *Id.* at 370.

Considering FTB as a whole, the system does not replicate bingo by incorporating all of the characteristics of the game into an electronic or electromechanical form. Essential features of bingo are not made electronic. The ball is still manually drawn by a ball caller; the player must still cover his or her numbers by hand and move a shutter across a number; and the player must push the red button to call "Bingo." Accordingly, FTB is not a facsimile of a game of chance. It is a technologic aid.

Conclusion

Given all of the foregoing, it is my opinion that Fast Track Bingo is a Class II game played with a technologic aid within the meaning of the Indian Gaming Regulatory Act. This opinion applies to the version of the game presented and will not apply if the game is modified with new or different features not considered in this submittal or if the game is operated or played in a manner inconsistent with the manner described in this opinion. The features discussed in this opinion, along with the manner and sequence of events in game play, are integral to this opinion. Finally, I note that as a technologic aid to a Class II game, before Fast Track Bingo may be offered for use in a tribal casino, it must be tested for compliance with the requirements of NIGC's Technical Standards, 25 C.F.R. part 547, by an independent testing laboratory and approved for use by the relevant tribal gaming commission.

Please address any questions about this opinion to Michael Gross, Associate General Counsel, General Law, at 202-632-7039.

Sincerely,

Penny J. Coleman
Acting General Counsel