OCT 17 2003

Bill Langley
Chairman, Cherokee Nation Gaming Commission
P.O. Box 627
Tahlequah, OK 74464-0627

Re: "Phone Card Sweepstakes Machines"

Dear Chairman Langley:

You request an opinion on whether the play of gaming devices known as "phone card sweepstakes machines," offered in several smokeshops regulated by the Cherokee Nation constitute Class III gaming as that term is defined by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, et seq., and regulations of the National Indian Gaming Commission (NIGC). Based on descriptions of the devices provided by your staff and reports from site visits to some of the facilities by NIGC field representatives, we conclude that play of the devices is a Class III gaming activity.

Description

The devices are stand-alone units that offer a patron the opportunity to play a video gambling game. Each device contains a bill acceptor, and for each dollar paid, the patron receives credits to play the "phone-card sweepstakes," a spinning reel game on a video screen. Typically, the player receives 20 credits for each dollar paid. The devices have the ability to accept several bills and will issue game credits based on the amount of money inserted. The player can win or loose credits while playing the game. The player wins by aligning similar figures on a pay line; in some versions there are eight such pay lines available depending on how many credits are applied. Some machines offer progressive prizes and special bonus features. All of the devices have common features including buttons to operate the game being shown or played on the video screen. Winners are paid in one of two ways. Some machines dispense a ticket that is equal to a specified number of credits. In the version reviewed, the player can receive a ticket worth one dollar for every 20 credits, the same value paid for the credits. When the ticket is dispensed, the credits available to the player on the device are reduced corresponding to the value of the ticket. Other machines provide receipts that are printed at the request of the player when the player decides to "cash out." Players redeem the tickets or the receipt for cash with the store operator.

In addition to the game-play opportunity, the patron will also receive either a separate horoscope card or a phone-card when the player inserts money into the machine. The horoscope card contains a phone number to call for a recorded horoscope reading.

The phone-card contains a number for a patron to call to obtain a two-minute long distance phone call.

Analysis

These gaming devices appear to be similar to devices already considered by the NIGC and/or federal courts. They are equivalent to, or at least very similar to, those devices recently considered by the NIGC in its recent decisions on skill-amusement games.[1] These formal decisions of the NIGC, supported by federal case law, establish devices such as the machines described above as Class III gambling devices. Although there is a separate commodity received, the phone card or the horoscope card, the fundamental elements of a gambling transaction—consideration, chance, and prize--are present in the play of the devices. The devices offer an electronic facsimile of a game of chance, which by definition makes play of the devices Class III gaming. See 25 U.S.C. §§ 2703(7) and (8) and 25 C.F.R. § 502.4.

The analysis found in the NIGC opinions and in the supporting federal case law on what constitutes a gambling device is relevant to our consideration of the "phone card sweepstakes machines." There is no serious dispute that these devices offer a gaming opportunity. The player will insert money into the device and receive the opportunity to play a game as a result of that payment of money. The patron will play a game in an electronic medium for a prize, the reward of which is determined solely by the element of chance.

That being said, the commercial vendors owning and placing these devices in the tribal smokeshops will often put forward two arguments that play on the devices is not gambling and is therefore exempt from IGRA coverage. First, a patron actually receives something of benefit in addition to the opportunity to play the sweepstakes video game. According to this argument the money placed in the machine—the consideration--is paid for the purchase of the phone card or the horoscope card and not to play the game. Second, a player can play the games offered on the devices without payment of consideration. According to this argument, the player can receive a free play of the game by sending in a letter request to the owner of the device, meaning that consideration is not required. We do not view either argument as controlling.

The patron uses the device to play a game of chance

In playing these "phone cards" devices, the patron is actually paying with the intent to play the game of chance and does not buy the card for the long distance service or the horoscope. The facts bear this out. Compared to phone cards generally available, the charge for the long distance minutes is extremely high--$.50 a minute. Unlike other phone cards, these cards have little use—the call can only last two minutes and there is

[1] See in the Notice of Decision and Order in the Matter of Seminole Nation of Oklahoma, NOV/CO 00-06, dated May 7, 2002, and the Notice of Decision and Order in the Matter of Cherokee Nation of Oklahoma, Nov/CO 5-99, dated May 24, 2002. Both decisions are available on the Commission's website: www.NIGC.gov.

no opportunity to use a series of cards to lengthen the call without redialing. Patrons do not want the phone cards—patrons simply throw them away or let them fall to the floor as they come out of the device. The real value of the purchase is in the potential, determined by the element of chance, to play the "sweepstakes" game and win a prize. The long distance minutes contained on the card are made available in an effort to justify these machines as something other than what they are, devices that facilitate a gambling transaction. Like the "phone cards," the horoscope reading is not the reason a player utilizes the device. The reading is incidental to the transaction, at best.

The patron pays consideration to play the game

The argument that some players can play for free by requesting a voucher for a free play from the vendor may be useful to evaluating the individual transaction played with the free voucher but it does not serve to control the characterization of the device generally. Each transaction, or game, can be viewed independently. The free voucher method of play is seldom used, and may not be available for every device, depending on the vendor placing the device. When this free voucher is available, it is for a single game or for a limited number of credits, and must be obtained by sending a self-addressed stamped envelope to the gaming device vendor; the vendor will return only one voucher per request. Thus, it costs the patron two stamps ($.74) and two envelopes to obtain a $1.00 voucher, hardly a savings. This alternative method for obtaining play of a single or a limited number of game plays is intended to be difficult for the patron so as to discourage its use. Common sense suggests that the alternative method is made available merely to allow the argument that consideration is not required rather than to actually facilitate game play using the alternative method. We understand that virtually all of the games are played in the traditional way: a player pays by inserting a bill into the bill acceptor on each machine; the player seeks to win a prize; and the player wins through the application of an element of chance.

An alternative method of entry for entry can be acceptable in certain situations thereby eliminating required consideration as an aspect of the gambling transaction. This often depends on the intent of the game. For example, in a fantasy sports league a participant will pay a fee to play in the game on a computer—even a computer located in a tribal gaming facility--with the understanding that a portion of the fee will be used in a prize pool. Although skill is an aspect involved in determining the winner of that prize, based on ability to make knowledgeable picks, chance is also an aspect. The elements of a gambling transaction are present--prize, chance, and consideration. However, an alternative method of entry will allow a participant to play for free by sending his picks through the mail to the game facilitator. So long as this potential method of play is readily available for all patrons, and so long as the non-paying player may compete on equal footing with the paying entrants, this fantasy sports league could be considered not gaming under the IGRA.

The play of the sweepstakes phone-card machines is different. The availability of the free game play in made difficult by the vendor compared to the ease of play for the paying participant. It also costs almost as much to obtain a "free" game as it does to

simply pay for play. The theory of the game is also different. In the phone-card sweepstakes machine game, play is rapid and chance is the only factor used to determine the winner.

Conclusion

All of the classic elements of a gambling transaction are present in the play of the "Phone Card Sweepstakes Machines." They are subject to regulation under the IGRA if played on Indian lands and constitute Class III gaming, as discussed above. State law is not relevant to the analysis. The fundamental question presented is whether the activity is gaming regulated by IGRA or whether it is exempt from IGRA, which is a matter of federal law. If this gaming activity were not offered on Indian lands over which the Cherokee Nation, or some other tribe, has jurisdiction, then state law would apply.

Other issues are presented based on operation of gaming devices in smokeshops.

- A tribal regulatory authority must license each gaming facility operated by the tribe. If a facility offers any Class II or Class III gaming activity, it must be licensed. If these stores are not tribally owned, the tribe cannot issue a gaming license. We can provide a separate memorandum discussing the ability of a tribe in Oklahoma to license a gaming operation that is not owned by the tribe at your request.

- A tribe must ensure that gaming in each facility it operates is conducted in a manner that adequately protects the environment and the public health and safety.

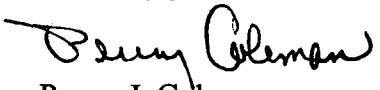
- An annual outside audit must be conducted for each activity and the audit provided to NIGC.

- The tribe must have a background and licensing program such that the managers and key employees of these facilities, as those terms are defined in IGRA, are licensed.

- Internal controls must be in place for these facilities to the extent they are required under the standards adopted by the tribe that are as strict as those established by the NIGC MICS.

Please call me, Senior Attorney William Grant in our Office of General Counsel, or Region Director Tim Harper in the NIGC Tulsa Office, if you have any questions about this advisory opinion.

Sincerely yours,



Penny J. Coleman
Acting General Counsel