Seneca Gaming Authority

345 THIRD STREET - SUITE 404 - NIAGARA FALLS, NEW YORK 14303
TELEPHONE: 716-299-1246 • FAX: 716-299-1247

Via Mail and E-Mail

June 29, 2017

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street NW
Mailstop #1621
Washington, DC 20240

Re: Class III *Guidance* related to the Draft Class III MICS

Dear Chairman Chaudhuri:

As requested, enclosed please find the discussion related to the Draft Class III MICS Guidance.

If you have any questions regarding this document, please contact me. Thank you.

Sincerely,

Rodney D. Pierce

Rodney Pierce
SGA Chairman

cc: SGA Commissioners
Marie Williams, SGA Executive Director
Rebecca Chapman, SGA Chief Counsel
Luther Anderson, SGC Director of Compliance

Seneca Gaming Authority

345 THIRD STREET - SUITE 404 - NIAGARA FALLS, NEW YORK 14303
TELEPHONE: 716-299-1246 • FAX: 716-299-1247

Via Mail and E-Mail

June 29, 2017

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street NW
Mailstop #1621
Washington, DC 20240

Re: Class III *Guidance* related to the Draft Class III MICS

Dear Chairman Chaudhuri:

On behalf of the Seneca Gaming Authority (SGA), thank you for your May 4, 2017, Comment Submission Notice related to the Draft Class III MICS Guidance. Based on the previous Dear Tribal leader letter of December 22, 2016, the National Indian Gaming Commission (NIGC) proposes to suspend current 25 CFR Part 542 standards and replace them with the proffered draft that specifies its status as *guidance*, and nothing binding or enforceable.

On August 24, 2005, the District Court in the District of Columbia ruled against the National Indian Gaming Commission and in favor of the Colorado River Indian Tribe. See *CRIT v. NIGC*, 04-0010 (D.C. 2005). In that case, the Court agreed that NIGC lacked authority to promulgate and enforce Class III gaming regulations (MICS) and such matters remained part of the Tribal-State compacting process. *Id.* The Appeals Court upheld the decision on October 20, 2006. See *CRIT v. NIGC*, 05-5402 (CRIT D.C. Cir 2006).

We appreciate that NIGC acknowledges the decisions and offers the draft Class III MICS as *guidance* and not a binding or enforceable set of rules in contravention of *CRIT*. Further, we understand your position that guidance, unlike formal regulations, does not require a formal Notice and Comment period under the Administrative Procedures Act (APA). Moreover, we understand your position that prior regional meetings and submission notices to suffice as consultation in lieu of a formal Notice and Comment period.

That said, we still recommend more formality akin to the Notice and Comment rules of the Administrative Procedures Act. We see the benefit of *guidance*, and creating a more malleable and fluid set of rules that are open to change. But a series of timelines to provide feedback on specific components of the Class III MICS guidance might prove beneficial to both sides. It would increase communication and help address practical issues after further consideration. We would also suggest a tribal workgroup to consider the impact of Class III MICS guidance on Tribal-State Compact Standards.

Generally, New York State Compacts contain their own set of Minimum Internal Control Standards, separate and distinct from those passed by NIGC. NIGC's *guidance* would create standards similar to, or the same as, Class II MICS. But there may be instances where the *guidance* conflicts with the Compact or with Internal Control Standards (SICS) created in compliance with a Compact. This can create confusion from a regulatory perspective and real communication is necessary to avoid practical conflicts.

Previously, the Nation attempted to create a universal system of controls to incorporate Class II standards, Class III standards and the Compact. That effort failed to produce a document that avoided clear conflicts and inconsistencies. This *guidance* is meant to aid mixed-use facilities by creating same or similar standards for Class II and Class III. But for New York tribal operations working under their own set of Compact controls, it does little to aid them in avoiding conflicts.

Another possible area of conflict or concern are Agreed-Upon Procedures (AUP's) and Annual Audits. Despite the classification as *guidance*, it remains unclear whether NIGC will require and conduct Class III AUP checks and Annual Audit checks. Checklists and forms will require revision, but it remains possible that a gaming operation could be held accountable for non-compliance with purportedly non-binding *guidance*. This could happen in any mixed-use facility and lead to confusion. Further, any mixed-use facility in New York might see confusion in attempting to comply with Class II and Class III standards for the player tracking, promotions, comps, patron deposit, kiosk, keno, cage, vault, and other areas while maintaining its Compact Standard and Controls. For these general reasons, we would suggest a tribal workshop to look at each section of the proffered *guidance* and its impact on Indian Country Compacts.

As for more detailed comments, we note that the *guidance* lacks a specific requirement for the tribal regulator to approve all downloads. The language that would complement standards under 25 CFR § 547.12, should contain the specific requirement enabling a Tribal Gaming Regulatory Authority (TGRA) to approve downloads in a way that promotes integrity and strengthens operational security.

Moreover, we note that operational security, and control of servers and routers, becomes challenging when vendor servers and routers operate many states away from the Tribe. Strategies for implementation and enforcement could be an important discussion topic in a tribal workgroup. Additionally, we note that the *guidance* provides requirements for progressive slots, but it fails to address progressives in keno or table games. We invite NIGC to consider this addition.

As an aside, we also note that NIGC offered a new draft regulation for 25 CFR § 547.18 for mobile gaming. We understand this does not condone or regulate internet gaming, but only addresses handheld devices that connect to a gaming machine inside the operation. These devices could be used anywhere that meets IGRA's requirements for land that is eligible for gaming. Specifically, devices could be used in hotels, restaurants, and resort areas connected to a casino without turning those areas into additional gaming operations or gaming floors. That said, we question the need for a regulation when 25 CFR § 547.15 already details wireless security and communication. Any clarification for mobile gaming under 25 CFR § 547.18 could be duplicative. Further, technology changes occur so rapidly that ensconcing one format of regulation for one model of technology into 25 CFR Part 547 seems futile. When the technology changes, the rule will already be obsolete. We recommend, instead, an NIGC Bulletin that can undergo repeated updates as technology changes.

Finally, it remains unclear from the submitted *guidance* whether 25 CFR § 542.4 will remain in some format as part of the *guidance*. This section compares the NIGC MICS against standards in Compacts. As the *guidance* cannot be binding, we recommend that this section not remain. Please give consideration to our comments and I look forward to working with you on future endeavors.

Sincerely,

Rodney D. Pierce

Rodney Pierce
SGA Chairman

cc: SGA Commissioners
Marie Williams, SGA Executive Director
Rebecca Chapman, SGA Chief Counsel
Luther Anderson, SGC Director of Compliance