

June 30, 2017

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Mr. Jonodev Chaudhuri, Chairman  
National Indian Gaming Commission  
1840 C Street NW  
Mailstop #1621  
Washington, DC 20240

Re: Comments on NIGC Consultation Topics #1-6

Dear Chairman Chaudhuri:

On behalf of the Seneca-Cayuga Office of the Gaming Commissioner (“SCOGC”), I am pleased to respond to your Dear Tribal Leader Letter of November 22, 2016, seeking comments on the following consultation topics:

1. Draft Guidance for Voluntary Non-Binding Class III Minimum Internal Control Standards (“MICS”);
2. Rural Outreach;
3. Developing a Strong Tribal Workforce Through Training;
4. Management Contract Regulations and Procedures;
5. Technical Standards for Mobile Gaming Devices; and
6. Fees.

The SCOGC appreciates the opportunity to provide input during this early stage of the decision-making process and hopes the comments below prove helpful as the National Indian Gaming Commission (“NIGC”) moves forward in its deliberations.

1. Draft Guidance for Voluntary Non-Binding Class III Minimum Internal Control Standards.

In response to tribal comments received during the NIGC’s 2015-2016 consultations, the NIGC is proposing to suspend enforcement of the Class III MICS at 25 C.F.R. Part 542 and issue an updated version of the Class III MICS as voluntary, non-binding guidance. The SCOGC finds this to be an appropriate solution to the problem of reconciling the Class III MICS regulation with the *Colorado River Indian Tribes v. NIGC* decision, which limits the NIGC’s authority to impose operational standards on Class III gaming. We agree that a complete withdrawal of the

regulation would not be prudent, as it would put some tribes out of compliance with their compacts and gaming ordinances.

For example, the Tribal-State Gaming Compact between the Seneca-Cayuga Nation (“Nation”) and the State of Oklahoma requires the Nation to comply with tribal internal control standards that equal or exceed those in Part 542. Leaving Part 542 in place in the Code of Federal Regulations will ensure that the Nation and other Oklahoma gaming tribes can remain in compliance with their respective compacts.

We also agree with the NIGC’s proposal to issue updated Class III MICS as voluntary, non-binding guidance, which recognizes the primary role of tribal regulators in developing their own Class III internal controls. However, we urge the NIGC to consider some of the possible unintended consequences that this may have on gaming facilities that offer both Class II and Class III gaming.

For example, it remains unclear what role the guidance will play with respect to Agreed Upon Procedures (“AUPs”) and annual audit checks, particularly for those facilities offering both Class II and Class III gaming. Audits are typically conducted for the entire gaming floor and do not always distinguish between different classes of games. This means that certain portions of the gaming floor may be subject to the voluntary guidance only, which could cause some confusion as to what should constitute an audit finding.

There is also the potential for conflict when applying any controls and standards required under gaming compacts, which are separate and distinct from those enacted by the NIGC. The Nation’s compact, for example, requires the Nation to comply with certain technical standards set forth in the State-Tribal Gaming Act. There may be instances in which the standards in the guidance conflict with those in the Compact or the system of internal controls (“SICS”) developed pursuant to the Compact. This could cause confusion among tribal gaming operators, regulators, and states on how compliance can be achieved.

In order to minimize the potential for conflicts and inconsistencies, we recommend the use of a tribal advisory committee consisting of tribal representatives with the Class III experience and technical knowledge to review the draft guidance and propose recommendations. We believe that the use of tribal advisory committees is a valuable and effective means of obtaining meaningful input from tribal representatives who have the expertise needed to identify any unforeseen issues and possible solutions for resolving them.

## 2. Rural Outreach.

One of the components of the NIGC’s rural outreach initiative involves the creation of an eighth region and expansion of the Rapid City satellite office to serve this new region. Although we would not be directly affected by this change, we nonetheless have some concerns with the significant costs associated with this restructuring.

By adding a new region, the NIGC is hoping to streamline its administrative processes and reduce burdens on the St. Paul region, which is currently the largest administrative region of the agency. We understand the NIGC's desire to improve administrative efficiencies, but question whether a new regional office is the most cost-effective means of achieving this objective. Before moving forward with this proposal, we urge the NIGC to carefully weigh the overall costs and benefits of the proposal, and to consult with affected tribes in the region to determine whether a compelling need exists to justify the costs involved in establishing and staffing a new regional office.

### 3. Developing a Strong Tribal Workforce through Training.

We support and welcome the NIGC's initiative to enhance its external training program to ensure that it continues to meet the needs and demands of the tribal gaming industry. We especially appreciate the efforts to update offerings relating to the regulation of gaming technology, which has become an issue of primary concern to both tribal operators and regulators. As a gaming regulator, we understand the importance of staying current with the latest gaming technologies and innovations and having the proper tools for identifying and addressing new security threats as they emerge.

We understand that the NIGC is in the process of revising its training catalogue and is seeking feedback on how its trainings can be improved. We encourage the NIGC to consider adding a new cross-training component to its trainings that includes site visits and observations by NIGC staff of the day-to-day functions of tribal gaming regulators. Tribal regulators serve as the front-line regulators with primary responsibility for implementing and enforcing the policies and regulations developed by the NIGC and can offer a perspective that would not otherwise be available to NIGC staff. While federal regulators have the ability to look at a broad range of gaming operations, they lack the more immediate perspective enjoyed by tribal regulators who are responsible for the day-to-day regulation of an individual gaming operation. This is an important perspective that could help bridge any disconnect between perceived and actual regulatory threats and, in turn, improve communications and policymaking on issues of mutual concern.

### 4. Management Contract Regulations and Procedures.

At first glance, the submission requirements for management contracts in 25 C.F.R. Part 533 appear to be relatively straightforward; however, in practice, the process for obtaining management contract approval is fraught with uncertainties and unpredictability. The only timeframe in the regulation is with respect to the Chairman's approval, which must occur within 180 days after NIGC staff has determined that the submission is complete in accordance with Part 533. The period for reviewing submission documents and making this determination is not governed by any timeframe and can take anywhere from six months to several years, depending on the workload and resources available at the time.

In order to provide for a more timely and efficient review process, the NIGC should consider establishing timeframes for reviewing and responding to submissions during the initial review process. In some instances, an extension would be appropriate depending on the nature and complexity of the submitted contract documents. This would not only bring greater predictability and certainty to the process, but also allow for the approval process to proceed in a more timely and efficient manner.

The NIGC should also consider issuing a Bulletin or other guidance document that outlines the specific considerations involved in determining whether a submission is complete and ready for approval. For example, we understand that many, if not most, management contracts involve complex financing terms and conditions, which are closely scrutinized by the NIGC to ensure they do not violate the sole proprietary interest requirement in IGRA. The guidance document should include clear examples of contract language and provisions that have been or are likely to be viewed as an impermissible financial arrangement. This would not only be helpful in preventing unnecessary delays, but also provide tribes with the information they need to negotiate lawful management contracts.

#### 5. Technical Standards for Mobile Gaming Devices.

We have serious concerns with the new draft regulation, 25 C.F.R. 547.18, for mobile gaming and urge the NIGC to revise its approach by withdrawing the draft regulation and issuing the technical standards as guidance documents instead. While we understand the NIGC's interest in developing new standards to support security and system integrity for mobile gaming devices, we question the need for a regulation when 25 C.F.R. 547.15 already addresses technical standards for wireless security and communications. We do not believe a deficiency in the current regulations exist to warrant a new regulation.

Moreover, we do not believe that a new regulation is the appropriate mechanism for regulating this particular type of emerging technology. Regulations tend to be inflexible in that they cannot be readily amended to adapt to changing external forces. This is especially true in the gaming context, where technologies are constantly changing and evolving. The Class III MICS regulation is a recent example of how regulations that are tailored at specific technology or gaming equipment can later become outdated as operational needs change and technologies evolve.

Both tribes and the NIGC share a mutual interest in ensuring that regulations remain current and up-to-date with latest practices. We, therefore, recommend issuing these new technical standards as best practices or guidelines through guidance documents such as an NIGC Bulletin that can easily be updated as needed to keep pace with changes in the industry.

#### 6. Fees.

We generally do not object to the NIGC's proposal to set the fee rate only one time per year on November 1<sup>st</sup>. We note, however, that this could result in two different final fee rates in the first year of implementation, depending on when the final rule goes into effect. In such event, the regulation should provide an opportunity for tribes to make adjustments to prior payments as needed to come into compliance with the most current fee rate established for that year.

7. Conclusion.

In closing, we would like to express our appreciation for the opportunity to provide comments on these important consultation topics. We hope you give favorable consideration to our comments as you proceed with your deliberations.

Sincerely,



Danielle Brashear, Gaming Commissioner  
Seneca-Cayuga Office of the Gaming Commissioner