NOV-05-06

IN THE MATTER OF)
)
) OHA Docket No. NIGC 2005-2
)

Fort Sill Apache Tribe of Oklahoma)

Final Decision and Order

On appeal to the National Indian Gaming Commission ("Commission") from a notice of violation issued by the Chairman of the Commission to the Fort Sill Apache Tribe of Oklahoma (the "Tribe") for the untimely filing of quarterly fee statements and payments for the fourth quarter 2004 in violation of 25 C.F.R. § 514.1(c)(2).

Appearances

Robert Prince, Esq., for Respondent Fort Sill Apache Tribe of Oklahoma.

Andrea H. Lord, Esq., and Katherine L. Zebell, Esq., for the National Indian Gaming Commission Chairman.

Presiding Official

Candida S. Steel, Office of Hearings and Appeals, U.S. Department of the Interior.

FINAL DECISION AND ORDER

After careful and complete review of the agency record, pleadings filed by both parties, and the Presiding Official's recommended decision, the Commission finds and orders that:

1. 25 C.F.R. § 514.1(c)(2) requires each Indian gaming operation to submit quarterly fee statements and payments to the Commission no later than March 31, June 30, September 30, and December 31 of each calendar year.

2. The Tribe owns the Fort Sill Apache Casino in Lawton, Oklahoma.

3. The Tribe operated its casino in 2003 and 2004.

4. The Tribe's fourth quarter fee statement and payment for calendar year 2004 were due at the Commission on December 31, 2004, but were sent no earlier than January 3, 2005, and received by the Commission on January 10, 2005.

5. The Presiding Official's recommended decision that considerations of equity and fairness militate against upholding the notice of violation for an undisputed violation of Commission regulations is both contrary to law and an impermissible substitution of her judgment for the Chairman's discretion in matters of enforcement and is therefore reversed.

6. The Presiding Official's recommended decision that this late filing is excused by the failure of actual notice of the filing requirements by the Chairman to the Tribal leadership is contrary to law and thus reversed.

7. The Presiding Official's recommended decision that the Chairman is estopped from bringing a notice of violation because of various communications between the Tribe and the Commission staff is contrary to law and thus reversed.

8. The Chairman met his burden of proof.

9. Notice of violation 05-06 is upheld.

STATUTORY, PROCEDURAL, AND FACTUAL BACKGROUND

In the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, Congress deemed the establishment of an independent Federal regulatory authority for gaming on Indian lands, together with the establishment of Federal standards for gaming on Indian lands, "necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). Congress therefore created the National Indian Gaming Commission and gave it oversight regulatory authority for gaming on

Indian lands. 25 U.S.C. §§ 2702(3), 2704(a). As part of that oversight authority, Congress gave to the Chairman the authority to levy and collect civil fines against a Tribe "for any violation of any provision of [IGRA], any regulation prescribed by the Commission pursuant to [IGRA], or tribal regulations, ordinances, or resolutions requiring the Chairman's approval." 25 U.S.C. § 2713(a)(1).

The Commission's activities are wholly funded through fees paid on "assessable gross revenues," *i.e.* net gaming revenue, by each gaming operation. 25 U.S.C. § 2717(a); 25 C.F.R. § 514.1(a), (b). IGRA gives the Commission the authority to establish both the amount of such fees and a schedule of their payment. 25 U.S.C. § 2717(a). The Commission adopted regulations requiring the payment of fees, at a rate set annually, together with the filing of statements showing assessable gross revenues for the previous calendar year. 25 U.S.C. § 514.1(c). These regulations mandate that fee statements and payments be filed quarterly, and no later than March 31, June 30, September 30, and December 31, of each calendar year. *Ibid.*

The Fort Sill Apache Tribe is a Federally recognized Indian tribe that operates the Fort Sill Apache Casino in Lawton, Oklahoma. (See administrative record, Presiding Official's recommended decision, findings of fact 1-2.) The Tribe operated its casino during all or part of 2003 and 2004. (See finding of fact 2.)

From the end of the second quarter 2001, when the Tribe began submitting quarterly statements and fees, through the end of the second quarter 2004, the tribe filed 9 of 13 fee statements and payments late. (See affidavit of John McNeil, Exhibit B.) In the following table, shaded statements and payment were late:

Year	Quarter	Date due	Date filed
2001	2nd	6-30-01	7-06-01
	3rd	9-30-01	9-20-01
	4th	12-31-01	1-03-02
2002	1st	3-31-02	7-29-02
	2nd	6-30-02	7-29-02
	3rd	9-30-02	10-22-02
	4th	12-31-02	12-24-02
2003	1st	3-31-03	5-08-03
	2nd	6-30-03	7-07-03
	3rd	9-30-03	10-20-03
	4th	12-31-03	11-29-03
2004	1st	3-31-04	5-21-04
	2nd	6-30-04	6-23-04

(See administrative record, McNeil affidavit, Exhibit B.)

Mr. McNeil, the Tribe's certified public accountant, made the payments. He testified that he had express permission from a Financial Specialist on the Commission staff who monitors and receives quarterly statements and fees, to file first quarter payments late in the years 2001-2003. (See recommended decision, finding of fact 5; admin. record Exhibit S1.) There was no such agreement for the first quarter 2004. (See transcript, 96:21 – 97:12.) Mr. McNeil states, however, that he had express permission to file quarterly statements and fees within 15 days after their due dates. (See finding of fact 5.) Steve York, a gaming commissioner for the Tribe who is responsible for compliance, testified that the Chairman had taken no enforcement actions against any of the Tribe's previous late payments. (See transcript, 50:8 to 51:19; finding of fact 14.)

On May 26, 2004, the Chairman Hogen wrote to the leaders of all gaming tribes, including Jeff Houser, the Chairman of the Fort Sill Apache Tribe, about quarterly statements and fees. This letter states:

> In the past, the NIGC has not strictly enforced these [quarterly] deadlines because of the newness of Indian
> of familiarity with NIGC regulations.
>
> As a result of the NIGC's lenient policy, however, there continues to be a large number of tribes whose fee
> supporting worksheets are submitted after the required deadlines….
>
> Therefore, beginning with the June 30th compliance report, gaming operations will be shown out of compli
> worksheets and fees are not submitted by the stated regulatory deadlines….

(See admin. record, Exhibit S3A).

The Tribe's second quarter 2004 statement and fees were led timely, but its third quarter 2004 statement and fees were not. (See McNeil affidavit, Exhibit B.) On December 20, 2004, Chairman Hogen wrote to tribes that led their third quarter statements late, including the Fort Sill Apache Tribe. (See admin. record tab 1; transcript 125:4-7). This letter, addressed again to Chairman Houser states:

> The regulations of the National Indian Gaming Commission (NIGC) require gaming tribes to pay quarterly fe
> submit statements showing the calculation of these fees. Unfortunately, a signi cant number of tribes have fa
> payments and submit the required statements on time. As a result we are sending those tribes who failed to m
> obligations a warning notice. This letter constitutes a warning notice to your tribe.
>
> NIGC regulations require each gaming tribe to pay fees quarterly…. The Fort Sill Apache Tribe of Oklahoma
> comply with these provisions for the recently completed quarter. Payments and/or statements submitted by th
> received by the NIGC after the regulatory deadline….
>
> Following receipt of this notice, the Tribe should take action to ensure that its future fee payments and statem
> a timely basis. In the event that the Tribe fails to submit the fees and statements by the required deadline, the
> an enforcement action….

(See admin. record, tab 1; recommended decision, nding of fact 8.) This letter was received in the Tribe's of ces on December 27, 2004, but because of holidays and the vacations of many Tribal of cials, was not conveyed to Mr. York until January 3, 2005. (See ndings of fact 9, 11-

12.) Having received the letter that day, Mr. York testified that he took immediate action to have the filing made and spoke with Mr. McNeil. The fee statement and payment for fourth quarter 2004 were received by the Commission on January 10, 2005. (See finding of fact 13.) Mr. York admitted nonetheless that the Commission's regulations mandate due dates for quarterly statements and fee payments. (See transcript, 47:47:4-15.)

On March 16, 2005, Chairman Hogen issued notice of violation 05-06 to the Tribe for failure to make a timely filing of the fourth quarter 2004 fee statement and payment. (See admin. record, tab 4.) The Tribe timely appealed, (see admin. record tab 6), and the matter was heard by Candida S. Steel, Office of Hearings and Appeals, U.S. Department of the Interior, on May 26, 2005.) Following the submission of additional exhibits, the record closed on June 17, 2005. (See finding of fact 15).

The Presiding Official issued her recommended decision on July 28, 2005. The Chairman filed timely objections to the recommended decision. The tribe filed none. We now reverse the recommended decision and uphold notice of violation 05-06.

DISCUSSION

THE PRESIDING OFFICIAL'S CONCLUSION THAT CONSIDERATIONS OF EQUITY AND FAIRNESS MILITATE AGAINST UPHOLDING THE NOTICE OF VIOLATION FOR AN UNDISPUTED VIOLATION OF COMMISSION REGULATIONS IS BOTH CONTRARY TO LAW AND AN IMPERMISSIBLE SUBSTITUTION OF HER JUDGMENT FOR THE CHAIRMAN'S DISCRETION IN MATTERS OF ENFORCEMENT.

We note at the outset that the Presiding Official's recommended decision lacks any clearly demarcated conclusions of law or citations to any legal authority. It appears that the Presiding Official recommends dismissal for equitable reasons. This a presiding official may not do when

hearing a challenge to an enforcement action brought by the Chairman under the Indian Gaming Regulatory Act.

We understand and respect the right of presiding officials and administrative law judges to conduct hearings in accordance with his or own discretion, understanding, and conscience. *Ass'n. of Admin. Law Judges Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984). However, on matters of law and policy, hearing officers, though they might dispute the validity of agency policy, are nonetheless bound to it. *Ibid.*

The Administrative Procedure Act ("APA") 5 U.S.C. §§ 701 *et seq.*, makes the recommended decision of the presiding official contingent. It becomes the decision of the agency only in the absence of further agency action. When the agency does review the recommended decision, the agency retains all the powers which it would have had, if it made the initial decision on its own. 5 U.S.C. § 557(b). IGRA authorizes the full Commission, not a presiding official, to make final, reviewable determinations about the Chairman's enforcement actions for violations of IGRA. 25 U.S.C. §§ 2713(a)(2), 2714.

In short, a presiding official has only qualified decisional independence, *Ass'n. of Admin. Law Judges*, 594 F. Supp. at 1141, and that independence is constrained by statute. Nothing in IGRA or the Commission's regulations give a presiding official the power to review in equity the propriety of a notice of violation issued by the Chairman for a violation of IGRA. To the contrary, the Commission's regulations limit the presiding official's recommended decision to findings of facts and conclusions of law. 25 C.F.R. § 577.14.

It is evident here that the Presiding Official recommended dismissal on the basis of simple fairness, notwithstanding the fact that the Tribe's violation of the regulations establishing deadlines for filing quarterly fee statements and payments was undisputed. She found that "[t]echnically, the Tribe's quarterly statement and payment were received by NIGC 11 days late, and the Tribe does not dispute this fact." (See recommended decision, p. 5.) Nevertheless, she recommended dismissal of the notice of violation because "there are several factors … which militate against upholding a relatively minor [n]otice of [v]iolation that would have long-term adverse impacts on the tribe." (See recommended decision, p. 5.)

The Presiding Official found that the Tribe acted in good faith, without "disregard of the NIGC and its prerogatives," by moving to correct the late fourth quarter filing as soon as Chairman Hogen's December 20 warning letter was conveyed to Commissioner York. (See recommended decision p. 7.) She also found that upholding the notice of violation would have "the potential of an undue long-term impact" on the Tribe, because this notice of violation would be taken into account in setting civil penalties for any future violation. *Ibid.*

Thus the Presiding Official's decision calls into question the Chairman's exercise of his discretion in bringing this notice of violation, even though she found that the Tribe's late filing violated Commission regulations. The decision also questions any exercise of discretion by the Chairman in assessing a civil fine for a putative future violation. This the Presiding Official may not do.

Again, nothing within IGRA or the Commission's regulations places the Chairman's discretionary enforcement decisions within the scope of a presiding official's review. Moreover,

under the APA, the Chairman's discretionary enforcement decisions are not subject to the Presiding Official's review, even if she were reviewing the matter as a judge of the District Court.

The Supreme Court held twenty years ago that under 5 U.S.C. § 701(a)(2), agency decisions, when "committed to agency discretion by law," are presumptively unreviewable by a court, even under the usual "arbitrary, capricious, or an abuse of discretion" standard for review of administrative decisions. *Heckler v. Chaney*, 470 U.S. 821, 832-833 (1985). The presumption may only be rebutted when the substantive statute in question provides guidelines for the agency to follow in exercising its discretion. *Ibid.* That is, a discretionary decision may be reviewed only where there is a meaningful standard given against which to judge the agency's exercise of discretion – some criteria found in statute or the agency's own regulations by which one can determine whether the agency has, in fact, abused its discretion. *See, e.g., Webster v. Doe*, 486 U.S. 592, 599-600 (1988); *Arnow v. United States Nuclear Reg. Comm'n.*, 868 F.2d 223, 232 (7th Cir. 1989), *cert. denied*, 493 U.S. 813 (1989).

Thus, cases where the governing statutes and regulations say that an agency 'may' exercise its enforcement powers without saying 'how' it is to do so are "cases committed to agency discretion" under § 701(a)(2) and not reviewable. For example, in *Richardson v. FCC*, 1992 U.S. App. LEXIS 32633 (7th Cir. 1992), plaintiff filed a complaint with the FCC, asking that it take action against a local radio station for broadcasting information allegedly in violation of the Anti Drug Abuse Act of 1986, specifically that the station had used its license "for the purpose of distributing, or assisting in the distribution of, any controlled substance in violation of Federal law." *Id.* at *2. The FCC's Mass Media Bureau determined that no enforcement action was

warranted – the station did no more than broadcast the locations of police highway checkpoints – and the FCC itself affirmed the decision of no action. *Id.* at *2 - *3.

Following *Chaney*, the Seventh Circuit held the FCC's decision unreviewable under § 701(a)(2). The Anti Drug Abuse Act says that the FCC "may revoke" a license if used to distribute or aid in distributing controlled dangerous substances in violation of Federal law, but, the court found, nothing in that Act, its legislative history, in the Federal Communications Act, or in implementing regulations says how it should do so:

> Clearly by using this permissive language ["may revoke"], Congress granted the FCC complete discretion to Act….
>
> The Communication Act and the FCC's own regulations do not provide us with judicially manageable standa allow us to judge how and when the agency should exercise its discretion in enforcing the Drug Act….
>
> Both the Communications Act and the FCC regulations are silent on when the FCC should and should not en Without these standards, we cannot judge whether the FCC abused its discretion in not enforcing the Drug A station.

Id. at *4-*5. *See also, Webster*, above, 486 U.S. at 601 (personnel termination decisions by the CIA Director unreviewable under § 701(a)(2)).

Here, similarly, IGRA gives to the Chairman the authority to levy and collect fines against a Tribal operator for violations of IGRA, Commission regulations, or tribal gaming ordinances, regulations, or resolutions. 25 U.S.C. § 2713(a)(1). IGRA makes the Chairman's enforcement authority "subject to such regulation as may be prescribed by the Commission…," *ibid.*, and the Commission's enforcement regulations say only that the "Chairman may issue" a notice of violation for violations of IGRA, Commission regulations, or any tribal ordinance or resolution

approved by the Chairman. 25 C.F.R.

§ 573.3(a).

As such, nothing in IGRA or in the Commission's regulations provides standards for reviewing the Chairman's decision to bring an enforcement action against a violation. The Chairman's decision to enforce against the Tribe here, fair or not, is unreviewable by the Presiding Official.[1]

Lastly as to this point, the Supreme Court has identified structural or institutional reasons why the discretionary decision of the Chairman to bring, or not to bring, an enforcement action against a Tribe for an IGRA violation should be left to his unfettered discretion – judicial and quasi-judicial offices are not well suited to making, or second-guessing, agency decisions:

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves
> balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only
> violation has occurred, but whether agency resources are best spent on this violation or another, whether t
> to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall pol
> whether the agency has enough resources to undertake the action at all. An agency generally cannot act ag
> violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to de
> variables involved in the proper ordering of its priorities. Similar concerns animate the principles of admi
> courts generally will defer to an agency's construction of the statute it is charged with implementing, and
> adopts for implementing that statute.

Chaney, 470 U.S. at 831- 832. In short, we conclude that the recommendation of dismissal on fairness or equitable grounds is both contrary law and an impermissible substitution of the Presiding Official's discretion for the Chairman's and is, therefore, reversed.

The recommendation of dismissal for lack of actual notice to a Tribal official is contrary to law. Sufficient notice is provided by regulation as a matter of statute.

Next, the Presiding Official recommended dismissal of the notice of violation, concluding that actual notice of Chairman Hogen's December 20, 2004, warning letter to proper Tribal officials was "an essential requirement of the viability of" the notice of violation. The Chairman, she found, "may have" intended to send the letter in order to coerce compliance and "must have believed that actual receipt of that warning was an essential element for establishing non-compliance." Further, the Presiding Official found that the letter was received by Tribal officials on January 3, 2005, at which time the Tribe took immediate steps to remedy the late filing. (See recommended decision, pp. 6-7.) This requirement of actual notice is contrary to law.[2]

The Chairman's beliefs and intent – indeed, the May and December letters themselves – are not relevant to the question of whether the notice of violation should be upheld.[3] Regulations duly promulgated by an agency under the APA automatically take effect 30 days (or more, if specified) after publication in the *Federal Register*, 5 U.S.C.
§ 553(d), and such publication, as a matter of law, provides notice to all affected. 44 U.S.C. 1507. An agency has no duty or obligation to provide any additional notice, actual or otherwise, to those who are subject to deadlines in duly promulgated regulations. *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997).

If the May and December letters have any significance, it is no more than they purport. This Commission, like any other agency, is free not to exercise its compulsory powers if it thinks simple exhortation is sufficient to achieve its regulatory mission. *Public Citizen v. Nuclear Regulatory Comm'n.*, 901 F. 2d 147, 153 (D.C. Cir. 1990). The letters took exactly that approach. They remind the Tribes of the deadlines for filing quarterly fee statements and payments, let the Tribes know that the Commission's former "lenient policy" resulted in a lot of

non-compliance, and said that the Commission would be looking more carefully at quarterly filings going forward. (See admin. record, tab 1, Exhibit S3A.)

In any event, the only notice required here is given in 25 C.F.R. § 514.1(c)(2) and its list of quarterly deadlines. We conclude that the recommendation of dismissal for lack of actual notice to a Tribal official is contrary to law and, therefore, is reversed.

The recommendation of dismissal on the ground of estoppel resulting from communications between the Commission staff and the Tribe is contrary to law. Estoppel does not lie against the United States on that basis.

Finally, the Presiding Official apparently concluded that the Chairman was estopped from bringing the notice of violation. She based this conclusion upon representations made by the Commission staff – before, we note, the fourth quarter 2004 – that the Tribe could file its fee statements and payments 10 to 15 days late. She based her conclusion as well upon the absence of any prior enforcement actions. The Presiding Official wrote: "[i]t appears that the Tribe was lulled into thinking that their manner of conducting business with the NIGC was acceptable to it, and that if personnel at the agency felt that there was a problem, the Tribe would be given plenty of time to remedy the situation before any adverse action would be taken." (See recommended decision, p. 7.) The Chairman cannot be so estopped.

It is well settled that estoppel cannot be asserted against an agency of the United States when the claim arises from the conduct of a government employee who provides incorrect information or acts in a manner inviting reliance. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-385 (1947); *Boulez* v. *Commissioner of Internal Revenue*, 810 F. 2d 209, 218 n. 68 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 896 (1987). As the Supreme Court explained:

> Whatever the form in which the government functions, anyone entering into an arrangement with the Gov
> risk of having accurately ascertained that he who purports to act for the Government stays within the boun
> The scope of this authority may be explicitly defined by Congress or though the rulemaking power…. An
> legislated in this instance, as in modern regulatory enactments is so often does, by conferring the rulemak
> agency created for carrying out its policy…. Just as everyone is changed with knowledge of the United St
> Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives le
> contents.

Merrill, 322 U.S. at 384-385.

Here, even if the Tribe made late payments in reliance upon representations made by the Commission staff as the Presiding Official found, that cannot be the basis for estoppel. There is no evidence in the record that the staff had the authority to make such representations, and nothing in IGRA or in the Commission's regulations provides such authority (a fact about which there was testimony, see transcript, 111:8-15.) Further, the Commission staff could not have the apparent authority to make such representations because the doctrine of apparent authority does not apply to dealings with the government. *United States v. District of Columbia,* 669 F. 2d 738, 748 n. 13 (D.C. Cir. 1981); *Littlejohn v. Washington Metro. Area Transit Auth.,* 1992 U.S. Dist. LEXIS 7510 at *6 (D.D.C. 1992). The Tribe is charged with knowledge of 25 C.F.R. § 514.1(c).

In short, we conclude that the recommendation of dismissal on the ground of estoppel is contrary to law and is, therefore, reversed.

The Chairman met the burden of proof necessary to sustain the notice of violation.

In administrative appeals of enforcement actions under 25 C.F.R. Part 573, the Chairman bears the burden of proof and the standard of review is preponderance of the evidence. *In the Matter of JPW Consultants,* NIGC 97-4; NIGC 98-8, Nov. 13, 1998 (citing *In the Matter of Shingle Springs Band of Mewok Indians,* NIGC 97-1, Dec. 3, 1998). Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as

whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *Id*. at 4.

Here, 25 C.F.R. § 514.1(c) requires that fourth quarter fee statements and payments be received at the Commission headquarters in WashingtonD.C. no later than December 31. It is undisputed in the record that the Tribe was aware of this regulation and that its fourth quarter statement and payment were received by the Commission on January 10, 2005.[4]

CONCLUSION

Given all of the foregoing, the recommended decision is reversed and notice of violation NOV 05-06 is upheld.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION on this _25th_ day of August, 2005.

__/s/_____

PHILIP N. HOGEN
CHAIRMAN

____/s/_____

NELSON W. WESTRIN
VICE-CHAIRMAN

____/s/_____

CLOYCE V. CHONEY
COMMISSIONER

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[1] We note that the Chairman's decision to enforce here was eminently fair. The Tribe filed many late fee statements and payments against which the Chairman took no action. It received as well the Chairman's two letters explaining that the Commission's regulations mandate timely filing of fee statements and payments and specific deadlines for such filing.

[2] We note that the Chairman's letter was actually received in the Tribal of ces on December 27, 2004, and thus the Tribe had "actual notice" of the contents of the letter on that date.

[3] The record is silent on the Chairman's beliefs about the December 20 letter and, at most, only inferences may be drawn about his intent. There was testimony that he sent the May 26, 2004, letter to all tribes reminding them of the quarterly ling requirements and deadlines, and that he sent the December 20 letter to the fteen or so Tribes who missed the third quarter ling deadline anyway. (See transcript, 115:25 – 116:17; 124:15 – 125:7.) We are not bound by speculation or inferences. *Drexel Burnham Lambert Inc. v. Commodity Futures Trading Comm'n.,* 850 F. 2d 742, 747 (D.C. Cir. 1988) ("agencyis not bound by [an ALJ's] 'secondary inferences,' or 'derivative inferences,' *i.e.*, facts to which no witness orally testi ed but which the [ALJ] inferred from facts orally testi ed by witnesses whom the examiner believed").

[4] We note a great deal of discussion in the record concerning an error, carried in the Commission's records for some time, concerning the amount of fees owed and paid. The error was eventually corrected. That discussion is irrelevant here, as this notice of violation concerns only the timeliness of the Tribe's fourth quarter 2004 fee statement and payments, not the amount of the fees paid in that, or any other, quarter. Even if the Tribe had a credit that the Commission could put toward fees for the fourth quarter 2004, the submission of the fee statement was late.