



July 3, 2013

Tom Foley
Foley Law, PLC
W1450 First National Bank Bldg.
332 Minnesota St.
Saint Paul, MN 55101

Re: NetPoker Gaming System Game Classification Decision

Dear Mr. Foley:

You requested the National Indian Gaming Commission (“NIGC”) review the NetPoker gaming system and determine its classification under the Indian Gaming Regulatory Act (“IGRA”). NetPoker is played similarly to a traditional game of poker, but in a virtual environment.

Pursuant to the IGRA, Class II gaming includes non-banking card games if such card games:

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wages or pot sizes in such card games.

25 U.S.C. § 2703(7)(A)(ii). Your request did not identify a state in which the game would be played. Therefore, this decision is not state specific and contains no analysis of state gaming laws. This determination is confined to the question of whether NetPoker meets the non-banking and technologic aid requirements for Class II status.

I have reviewed the game description you submitted and conclude that NetPoker is a Class II game, so long as it is played in a state in which the requirements in 25 U.S.C. § 2703(7)(A)(ii) (I) or (II) are satisfied, it is Class II.

Game and Equipment

NetPoker is similar to the Texas hold'em variation of the standard poker card game, played on a machine or electronically, rather than on an actual card table. The NetPoker system has linked terminals, servers, and software that communicate across

gaming facilities through a secured private network system. It is designed to connect players across different gaming facilities, possibly in different jurisdictions, analogous to a wide area network. The machine's video screen displays a traditional felt table, with a dealer in the standard spot shuffling and dealing the cards. The player can see his/her cards and the community cards. Buttons on screen allow a player *fold*, *call*, *raise*, or sit out. The player can add money into each machine.

As with Texas hold'em, in NetPoker the wagers are made against other players rather than a banker or the house. NetPoker is played live, in real time, with players competing against each other. The house collects a fee from the players for facilitating game play. At least two players are required for a NetPoker game to begin, but each game can accommodate up to nine players. A player joins by depositing money into the credit account, then transferring from the credit account to the *stack* account, which is the amount of money the player is bringing to the table.

NetPoker, like traditional Texas hold'em, utilizes a rotating blind system,¹ designed to generate money to put into the pot and stimulate betting. To begin play, a player chooses a table with set blind amounts and then is placed in a game. A player does not get to choose his/her position at the table. A button signifies the dealer's position and rotates clockwise around the table, shifting the position of the blind bets. But after the required blind wagers, the bet can be for any amount up to the total amount the player has on the table.

To begin, the two players to the left of the dealer make mandatory blind bets, made before the players have an opportunity to see any cards. The player on the dealer's immediate left puts out the *small blind*, and the player to the immediate left of the *small blind* puts out the *big blind*. The *big blind* is typically the minimum allowed bet at the table. The *small blind* bet is usually a half or a third of the *big blind* amount. So, if the minimum bet was \$5, the *big blind* would place a forced bet of \$5, and the *small blind* would be \$3. NetPoker has no betting limit though, so the players post blinds according to a set schedule that varies by table.

After the blind bets are made, the virtual dealer shuffles a standard deck of fifty-two playing cards and deals each player two cards, face down, known as *hole* or *pocket* cards. After this initial deal, a round of betting begins with the player to the left of the blinds. At this point, the players can call, raise, or fold. Any raise must be at least double the previous bet, unless the player does not have enough money in which case that player can go all-in.

After the initial round of betting ends, the game deals the next three cards, the *flop*, face-up on the table. These are communal cards that each player can use in combination with his/her two *hole* cards to form a poker hand. The *flop* is followed by

¹ A *rotating blind* is a required bet to begin the first round of betting and initiate play that rotates around the table for each new game.

another round of betting. A fourth card is then dealt face up, the *turn card*, as part of the community of shared cards, after which another round of betting takes place. A final fifth community card, known as the *river*, is dealt face-up, followed by a final round of betting. The remaining players show their cards and the person who can make the best five-card hand by combining their *hole* cards with the community cards wins the pot.

NetPoker offers five different fee structures from which a gaming operation may choose: (1) a fee as a percentage of the player's wager; (2) a flat fee for each time a player antes up in a round; (3) a set fee assessed to the player after each betting round; (4) an up-front fee to play the entire game or a portion of the game; and (5) a fee to play for a set amount of time. The fees are collected from the players and paid directly to each gaming operation. The fees are not shared between the gaming operations.

Analysis

IGRA divides the world of Indian gaming into three classes. Class I gaming, which is not at issue here, encompasses "social games" played "solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). IGRA defines Class II gaming to include:

- “(ii) card games that -
 - (I) are explicitly authorized by the laws of the State, or
 - (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.”

25 U.S.C. § 2703(7)(A)(ii); 25 C.F.R. § 502.3. IGRA further defines Class II gaming by pronouncing what it is not. Banking card games are not Class II gaming. 25 U.S.C. § 2703(7)(B)(i). Nor are electronic or electromechanical facsimiles of any game of chance or slot machines of any kind considered Class II. 25 U.S.C. § 2703(7)(B)(ii).

Class III gaming is a catchall category that includes all forms of gaming that are not Class I gaming or Class II gaming. 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

To determine NetPoker's classification requires analyzing whether the game is banked or non-banked and whether it is an electronic aid or an electromechanical facsimile. Banking games, as commonly understood and as defined in NIGC regulations, are games in which the banker (usually the house) is a participant in the game, taking on all players, collecting from the losers and paying all winners. *See* 25 C.F.R. § 502.11.

Conversely, non-banking card games are games where players play against each other. The traditional game of poker is a typical example of a non-banking card game.

NetPoker is a non-banking card game of poker. The players play one another rather than a banker or the house, taking wins and losses from each other. The house makes its money from the fee systems, described above, and not from the pot. As a non-banking card game, NetPoker constitutes a Class II game as long as it is not an electronic facsimile.

Thus, NetPoker must also be analyzed to determine whether it's an electronic facsimile or a technologic aid to a non-banking card game to determine if it is Class II. On December 17, 2009, the NIGC Office of General Counsel (OGC) issued a game opinion for Digideal Digital Card System, revisiting a 2004 game opinion on the same card system (*Digideal II*). The *Digideal II* opinion concluded that technologic aids to Class II card games meet IGRA's definition of Class II gaming.

Although IGRA does not define "electronic, computer or other technologic aid," NIGC regulations define them 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(a). Further, NIGC 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.

NetPoker's system satisfies the first element of a technologic aid. It assists play by electronically displaying a traditional Texas hold'em table, with *hole* cards and community cards arrayed around the table, enabling the player to decide whether to continue or to fold. It also shuffles and deals the cards. The system also assists in creating a game by allowing up to nine live players, who may not be in the same physical location, join a real-time game, allowing for broader participation.

In order to be a technologic aid, NetPoker must also not be an electronic or electromechanical facsimile of a game of chance. 25 C.F.R. § 502.7(a)(2). As noted above, NIGC 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. In the *Digideal* opinion, the NIGC Office of General Counsel made the distinction between a technologic aid and a facsimile for an electronic game of cards. It found that the game machine proposed by *Digideal* was not a facsimile because it did not incorporate all of the characteristics of poker.

The *Digideal* opinion looked at court decisions to reach its conclusion. For instance, in *Sycuan Band of Mission Indians v. Roache*, the court reviewed a wholly-electronic pull tab game in which the player bought and played pull tabs generated by computer and displayed on a video screen and concluded it was an exact, self-contained copy of paper pull tabs and thus an electronic facsimile. 54 F.3d 535, 542-543 (9th Cir. 1994). The court noted a wholly contained game was different from the same game in live form played with the aid of a computer or video. *Id.* at 543. In *Diamond Game v. Reno*, the machine at issue sold and dispensed paper pull tabs from a roll, then read and displayed the results of each tab in manner that resembled a three-reel slot machine. 230 F.3d 365, 370 (D.C. Cir. 2000). Nonetheless, the paper tabs could be played and redeemed manually. *Id.* The D.C. Circuit held that the machine was not an electronic facsimile containing all characteristics of pull tabs, and thus not a Class III game.

Further, the *Digideal* opinion found that the Digideal game incorporated some characteristics of poker, namely shuffling, dealing, and ranking winning and losing hands. Other aspects, though, such as deciding to play or fold, placing wagers, or putting in an ante were still done by the player. In contrast, video poker machines, considered Class III electronic facsimiles, accept bets, deal, evaluate the hand against standard poker rankings, and pay winning hands according to pay tables. Video poker machines, unlike Digideal, are exact, self-contained copies of poker.

As with *Digideal*, NetPoker's system shuffles, deals, collects the pot, displays the card, and enables broader participation in the game, by connecting players in different locations. But the player, not the NetPoker system, makes the decision on when to call, when and how much to raise, and when to fold. NetPoker incorporates some aspects of poker, but is not a wholly contained copy of Texas hold'em poker in a machine. It is a way to play the game - which assists a player in playing the game - and is not the game itself. As such, NetPoker is not an electronic facsimile.

Finally, the NetPoker meets the third element of a technologic aid: a system that "is operated in accordance with applicable Federal communications law." 25 C.F.R. § 502.7(a)(3). NetPoker is similar to wide-area progressive systems or multi-site bingo systems because it uses a closed, proprietary communications networks. The NIGC has determined that "closed, proprietary communications networks," like Virtual Private Networks (VPN), which NetPoker uses, do not violate federal communication law. See NIGC Bulletin 2009-03 at 3; Casino Gateway Network letter to Donald Bailey from Penny J. Coleman, Acting General Counsel, NIGC (Sept. 24, 2009) at 2.

In sum, NetPoker meets all three criteria for a technologic aid. Thus, so long as it is played in a state in which the requirements in 25 U.S.C. § 2703(7)(A) (ii) (I) or (II) are satisfied, it is Class II.

Letter to Tom Foley

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If you should have any further questions, please contact NIGC Staff Attorney Heather Corson at (202) 632-7003.

Sincerely,

A handwritten signature in blue ink that reads "Stevens". The signature is written in a cursive style with a large initial "S".

Tracie L. Stevens
Chairwoman