



November 25, 2014

Gary Green  
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Ortiz Gaming USA  
1181 S. Rogers Circle, Suite 4  
Boca Raton, FL 33487

Re: Classification opinion for "proposed innovation" by Ortiz Gaming

Dear Mr. Green:

This letter responds to your March 6, 2014 request for a classification opinion for a "proposed innovation" by Ortiz gaming. As described in pages two and three of your submission, the "innovation" allows the game to be played on a machine by only one player, so long as multiple cards are played. It is my opinion that this "innovation" removes the element of competition, resulting in an electronic facsimile of a game of chance and a Class III gaming machine.

#### Description of the game

The game is described as a bingo machine, displaying up to four digital bingo cards on the video screen. At the beginning of each bingo session, players are asked how many cards they would like to play and they may choose up to four. If a player chooses only one card, the screen will display a "waiting for a second player" message until additional players join the game. If, however, the player has purchased multiple cards, the game begins without delay.

#### Analysis

The Indian Gaming Regulatory Act defines Class II gaming, in relevant part as:

- (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo....<sup>1</sup>

The question here is not whether the underlying game is bingo, but whether the “innovation” is a technologic aid or something that transforms the machine into a Class III electronic facsimile.

From the outset, Congress recognized the need for technology in gaming and specifically provided for technological aids to be used with bingo. NIGC’s regulations define *electronic, computer or other technologic aid*, in relevant part, 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.<sup>2</sup>

Additionally, the regulation provides examples of the functions served by technological aids:

- (b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:
- (1) Broaden the participation levels in a common game;
  - (2) Facilitate communication between and among gaming sites; or
  - (3) Allow a player to play a game with or against other players rather than with or against a machine.

Although technologic aids are permissible in the play of Class II bingo, the similar “electronic or electromechanical facsimiles of any game of chance” are

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<sup>1</sup> 25 U.S.C. § 2703(7)

<sup>2</sup> 25 C.F.R. § 502.7(a)

necessarily Class III gaming devices.<sup>3</sup> The Commission's 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..."<sup>4</sup> Courts have adopted a plain meaning interpretation of the term *facsimile* and recognize a facsimile as a game that electronically replicates the characteristics of the underlying game.<sup>5</sup>

Though the distinction between technologic aids and electronic facsimiles is sometimes difficult to discern, courts and congress have been clear that a facsimile exists when a machine eliminates the need for competition with other *players*.

The Senate first identified the need for player-to-player competition in its report on IGRA when discussing allowable technology to broaden participation:

[S]uch technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.<sup>6</sup>

Relying upon the Senate's distinction, the Ninth Circuit determined that a lotto game played by only one participant and the machine was Class III:

The player can participate in the game whether or not anyone else is playing at the same time. Rather than broadening potential participation in a bingo-like game, Pick Six is an electronic facsimile in which a single participant plays against the machine. Accordingly, it cannot be classified as a Class II gaming device.<sup>7</sup>

Using the same reasoning eight years later, the Ninth Circuit contrasted the MultiMania bingo game with the Pick Six game to find that MultiMania bingo game was *not* an electronic facsimile.<sup>8</sup> The court explained that while the game looked like

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<sup>3</sup> 25 U.S.C. §2703(7)(B)(ii)

<sup>4</sup> 25 C.F.R. § 502.8

<sup>5</sup> *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) ("the first dictionary definition of 'facsimile' is 'an exact and detailed copy of something'"), *cert. denied*, 516 U.S. 912 (1995); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 636 (D.C. Cir. 1994)("[a]s commonly understood, facsimiles are exact copies, or duplicates").

<sup>6</sup> S.Rep. No. 446, 100th Cong., 2d. Sess. 9 (1988).

<sup>7</sup> *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir.1992).

<sup>8</sup> *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1099-101 (9th Cir. 2000).

a slot machine, the terminal merely allowed the player to connect to a network of other players and the game could not be played with fewer than twelve players.<sup>9</sup>

A key element of bingo is competition. The premise of the “innovation” is that the competition is between bingo cards and that this method of play broadens participation by allowing lone players to compete against their own cards when no other players are available. This understanding misreads the statute. IGRA requires competition not amongst cards, but amongst people.<sup>10</sup> The “innovation” is an addition to an otherwise sound game of bingo that not only electronically replicates the elements of the ball draw and cards, but also allows one player to electronically simulate competition by playing against himself with multiple cards.<sup>11</sup> Because it simulates all elements of bingo, the “innovation” is a Class III electronic facsimile.

### Conclusion

Despite the assertions that the Ortiz “innovation” looks like a bingo game, the true test is whether multiple players are required to play the game. The “innovation” imitates the elements of the game of bingo and is therefore a Class III facsimile under IGRA.

Thank you for your inquiry. If you have any questions, please contact Staff Attorney Jennifer Lawson at 202-632-7003.

Sincerely,



Eric Shepard  
General Counsel (Acting)

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<sup>9</sup> *Id.*

<sup>10</sup> See 25 U.S.C. § 27013(7)(i)(III) “the game is won by the *first* person covering . . .” (emphasis added)

<sup>11</sup> While some players may manipulate technology by using two machines to play against themselves, a game feature deliberately designed to facilitate this misuse is another matter entirely.