



May 13, 2020

VIA INTERNATIONAL MAIL & EMAIL

Mr. Darren Keyes
Vice President, Product
CloudStreet Gaming
545 King Street West
Toronto, Ontario
Canada M5V 1M1
dkeyes@cloudstgaming.com

Re: CloudStreet Hold'em Poker

Dear Mr. Keyes,

Mr. Bob Williams of CloudStreet Gaming requested the NIGC Office of General Counsel review CloudStreet's Hold'em Poker game and determine its classification. The rules for the game are similar to traditional Texas Hold'em, albeit CloudStreet's game is in an electronic format. Mr. Williams indicated that tribes in Florida and Oklahoma expressed interest in the game, but did not request a state-specific legal analysis. This advisory legal opinion, therefore, is not state-specific and contains no analysis of state gaming laws. It is confined to the question of whether CloudStreet Hold'em Poker constitutes a Class II or Class III game under the Indian Gaming Regulatory Act and NIGC regulations.

Based upon the game description submitted in the game rules, compliance deck, promotional materials, and written responses to follow-up questions, CloudStreet Hold'em Poker is a Class III game because of its automatic play feature that automatically posts blinds for players and acts for players when they fail to act. In so doing, the game constitutes an electronic facsimile of poker.

Game Description

CloudStreet Hold'em Poker is similar to the Texas Hold'em variant of the standard poker card game, though played on an electronic platform. Using touch-screen electronic consoles

connected via a central server, the game is played in real-time by three live players.¹ A network of consoles may be located within one large casino or several.

The game begins on demand when three players have joined by paying a buy-in. All players buy-in for the same amount, typically, twenty, fifty, or one hundred dollars² and are given the same amount of chips (that have no real money value) to play the game.³ Prizes are random⁴, ranging from double the players' buy-in to substantial progressive jackpots. Each game's prize is announced prior to its start. One winner generally wins the game unless the prize is the progressive jackpot. When that occurs, the progressive prize is split 70-20-10 between the first, second, and third place finishers, respectively.⁵

As with traditional Texas Hold'em, wagers are made against other players rather than a banker or the house. The casino(s) and Cloudstreet take a fee from the wagers, which they allocate between themselves. The amount of the fee depends upon the buy-in amount and can be configured for specific jurisdictions – usually, seventeen percent for a twenty-dollar buy-in and fifteen percent for fifty-dollar and one hundred-dollar buy-ins.⁶ An additional one-percent fee is charged and reserved for the progressive jackpot.⁷ The remaining money from the wagers is paid out as traditional prizes.⁸

Players are seated at the virtual table randomly, “using a proprietary matchmaking system which is designed to eliminate the chance of player collusion.”⁹ They may leave the game before it begins by pushing the exit button, returning to the buy-in screen where their buy-in will automatically be refunded to their machine balance.¹⁰ Once three players are seated and have paid their buy-in, the randomly-determined game prize is revealed.¹¹ “After the prize is

¹ After first looking for regular players to participate the game but, after a “reasonable time,” finding none, prop players are invited by the game server to fill games. *See* CloudStreet Poker NIGC General Rules at 6 (Nov. 8, 2019). Prop players play using their own personal funds, receive a rake-back, and may win prizes – playing the game as a regular player would and receiving no advantage. *Id.* The only distinction is that prop players may play three games simultaneously. *Id.* Regular players may opt-out of allowing prop players to play the game against them. *Id.*

² Email to Jo-Ann M. Shyloski, NIGC Of Counsel, from Darren Keyes, CloudStreet Gaming, Vice President – Product at 1 (Nov. 8, 2019).

³ CloudStreet Poker NIGC General Rules at 1 (Nov. 8, 2019).

⁴ “The random determination is made by a cryptographically strong random number generator [], located on the game server.” CloudStreet Poker Gameplay at 3 (Feb. 2020).

⁵ Email to Jo-Ann M. Shyloski, NIGC Of Counsel, from Darren Keyes, CloudStreet Gaming, Vice President – Product, *supra* at 2.

⁶ *Id.*

⁷ *Id.*; As an aside, the progressive jackpot is seeded by CloudStreet, and the seed amount varies by jurisdiction, approximately five to ten thousand dollars. *See* CloudStreet's answers to follow-up questions at 1 (Mar. 13, 2020). Repayment of the seed money will come from fifty-percent of the progressive jackpot contributions. *Id.*

⁸ Email to Jo-Ann M. Shyloski, NIGC Of Counsel, from Darren Keyes, CloudStreet Gaming, Vice President – Product, *supra* at 2.

⁹ CloudStreet Poker NIGC General Rules, *supra* at 2.

¹⁰ *Id.*

¹¹ *Id.*; Although the game prize is randomly determined and funded by players' wagers, CloudStreet guarantees it. *See* CloudStreet's answers to follow-up questions, *supra* at 1.

determined, the [] game play begins.”¹² A “virtual dealer” button is randomly assigned to one player “and moves clockwise to the next player after each hand is completed.”¹³ “The player immediately clockwise of the ‘dealer’ is designated the ‘small blind.’”¹⁴ And “[t]he player immediately clockwise of the ‘small blind’ is [] the ‘big blind.’”¹⁵ The forced blind betting amounts are set prior to the game commencing, listed on the gaming machine, and increase at fixed intervals throughout the game.¹⁶ The gaming machine automatically makes the blind bets on behalf of each blind player.¹⁷ If a player, however, does not have enough chips for the forced blind, they go all-in blind.¹⁸

After the blinds are posted, the game server’s random number generator shuffles a standard fifty-two card deck and deals each player two electronic cards face down, known as “hole cards.” To view the cards, each player may “peel” the corners of the digital cards up” or “tap and hold a finger on the cards.”¹⁹ The first round of betting is initiated by the player with the virtual dealer button (the virtual dealer).²⁰ “The amount of the big blind serves as the opening bet for the first round of betting and is considered the minimum bet for all betting rounds for that hand. All subsequent players must call this amount, raise or fold,” unless they go all-in.²¹ At this time, any raise must be “at least double the size of the big blind.”²² “Any raises [] re-open betting to the previous bet [] and can be raised again.”²³ “The maximum bet or raise is only limited by the amount of chips the player currently has.”²⁴ And “[t]here is no limit to the number of raises in a given betting round.”²⁵ A betting round “is closed once all the players have called the last bet or raise, or have folded.”²⁶

After the initial round of betting is complete and each player has acted,²⁷ the random number generator shuffles and deals three cards face up in the center of the table, known as “the flop.” These three cards are communal cards that each player can use in combination with their two “hole cards.” The flop deal is followed by another round of betting. On this round, and all subsequent rounds, the active player clockwise from the virtual dealer begins the betting.²⁸ At this juncture, “when a player bets all-in for less than the minimum bet, a [subsequent] player has

¹² CloudStreet Poker Gameplay, *supra* at 4.

¹³ CloudStreet Poker NIGC General Rules, *supra* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; CloudStreet’s answers to follow-up questions, *supra* at 3.

¹⁷ CloudStreet Poker NIGC General Rules, *supra* at 3.

¹⁸ *Id.* at 2.

¹⁹ CloudStreet Poker Gameplay, *supra* at 5.

²⁰ CloudStreet Poker NIGC General Rules, *supra* at 3.

²¹ *Id.* at 3.

²² *Id.* (prior to the flop).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Or, as described subsequently, the gaming machine has acted for the player.

²⁸ CloudStreet Poker NIGC General Rules, *supra* at 3.

the option of just calling the all-in amount.”²⁹ If the player raises though, it must be at least the amount of the minimum bet.³⁰ All follow-on raises then “must be equal to or greater than the size of the previous bet on that betting round, except when the player is all-in.”³¹ Check-raises are allowed.³²

The random number generator shuffles and deals a fourth communal card face up in the center of the table, known as “the turn.” Another round of betting then takes place. The cards are once again shuffled and a final, fifth face-up communal card - the “river” – is dealt, which is followed by a final round of betting.

“At showdown, all players still holding cards will have their cards automatically displayed, simultaneously.”³³ The players use their two hole cards and the five community cards to make the best five card hand. The player who makes the best five card poker hand wins, “and the chips are transferred to that player’s balance.”³⁴ The displayed cards then disappear, and play continues until two of the players “are eliminated by running out of chips and eventually becoming, and losing, all-in.”³⁵ The ultimate winner is the remaining player,³⁶ winning the pot, unless, as described above, it’s a progressive prize, then it is split 70-20-10 between the first, second, and third place finishers (respectively).

During a hand or game in which all three players are still participating, if “it is not a player’s turn, they will sometimes be presented with pre-action checkboxes,” which allow the player to pre-select their action on the current bet, including checking, folding, or calling (as well as calling all-in).³⁷ “If the bet changes prior to this player’s turn, the pre-action checkbox will become unselected and the player will then choose their action on their turn.”³⁸ However, throughout a game - regardless of the number of players, if a player fails to act within the allotted time³⁹, the machine automatically takes the following actions for the player: “[i]f there is no bet, the automatic action will be a check” or “[i]f there is a bet, the player’s cards will be folded.”⁴⁰ If the automatic action is not a fold, this continues on each of the player’s turns until they reengage and take affirmative action themselves.⁴¹

²⁹ *Id.* (after the flop).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 4. If a showdown does not occur, the players’ hold cards will be mucked and not revealed. CloudStreet Poker Gameplay, *supra* at 6.

³⁴ CloudStreet Poker Gameplay, *supra* at 7. Though ties are feasible, with each player taking half the chips, “down to the lowest denomination chip used in the game.” CloudStreet Poker NIGC General Rules, *supra* at 4.

³⁵ CloudStreet Poker Gameplay, *supra* at 7.

³⁶ *Id.*

³⁷ CloudStreet Poker NIGC General Rules, *supra* at 3; CloudStreet’s answers to follow-up questions, *supra* at 4.

³⁸ CloudStreet Poker NIGC General Rules, *supra* at 3.

³⁹ Twelve seconds.

⁴⁰ CloudStreet Poker NIGC General Rules, *supra* at 4; CloudStreet Poker Gameplay, *supra* at 6.

⁴¹ CloudStreet Poker NIGC General Rules, *supra* at 4.

Also, electronic consoles can play two separate games simultaneously with the player controlling “which game to take action on by tapping on the miniature view window for the game in which they wish to act.”⁴²

Legal Background

IGRA⁴³ 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.”⁴⁴ Class II gaming includes card games if they:

(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.⁴⁵

Class II gaming also expressly excludes any banking card game.⁴⁶ Banking card games, as defined by NIGC regulations, are games in which the banker (usually the house) competes against all players, collecting from losers and paying winners.⁴⁷ Conversely, non-banking card games are games where players play against each other, rather than the house or a single player acting as the bank.⁴⁸

Class III gaming is a catchall category and includes “all forms of gaming that are not Class I gaming or Class II gaming.”⁴⁹ Class III also includes any electronic or electro-mechanical facsimiles of any game of chance.⁵⁰ An electronic or electromechanical facsimile is defined by NIGC regulations to mean “a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game”⁵¹

Distinct from electronic or electromechanical facsimiles, and allowable for play with Class II games, are “electronic, computer, or other technologic aids.”⁵² NIGC regulations define electronic,

⁴² *Id.* at 5.

⁴³ 25 U.S.C. §§ 2701, *et seq.*

⁴⁴ 25 U.S.C. § 2703(6).

⁴⁵ 25 U.S.C. § 2703(7)(A)(ii); *See also* 25 C.F.R. § 502.3(c).

⁴⁶ 25 U.S.C. § 2703(7)(B)(i); 25 C.F.R. § 502.3(c); *see also* 25 C.F.R. § 502.4(a)(1).

⁴⁷ 25 C.F.R. § 502.11.

⁴⁸ *Id.*; 25 C.F.R. § 502.3(c).

⁴⁹ 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

⁵⁰ 25 U.S.C. § 2703(7)(B)(ii); 25 C.F.R. § 502.4(b).

⁵¹ 25 C.F.R. § 502.8.

⁵² 25 U.S.C. § 2703(7)(A)(i); 25 C.F.R. § 502.3(a).

computer or technologic aid 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.”⁵³ “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.”⁵⁴ “Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.”⁵⁵

So, whether a card game is Class II or Class III under IGRA and NIGC regulations requires an analysis of the game itself – primarily, how it is played.⁵⁶ If the card game satisfies IGRA and NIGC regulations’ definitions of Class II gaming, but is played using an electronic, computer, or technologic device, the determining factor in the game’s ultimate classification is whether the device is an aid to the play of the game, in which case the game is Class II, or whether the device is a facsimile of the game, in which case the game is Class III.

Analysis

To determine CloudStreet Hold'em Poker’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, takes on all players, collects from all losers, and pays all winners.⁵⁷ 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.

CloudStreet Hold'em Poker is a non-banking poker card game. The players play one another rather than a banker or the house, taking wins and losses from each other. Cloudstreet and casino(s) make their money from their fee, described above, not from the pot. As a non-banking card game, CloudStreet Hold'em Poker constitutes a Class II game so long as it is not an electronic facsimile.⁵⁸

⁵³ 25 C.F.R. § 502.7(a).

⁵⁴ *Id.* (b).

⁵⁵ *Id.* (c).

⁵⁶ See 25 U.S.C. § 2710(b)(1)(A) (“An Indian tribe may engage in, license and regulate, class II gaming on Indian lands within such tribe’s jurisdiction if – (A) such gaming is located in a State the permits gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited by Federal law) ...”).

⁵⁷ 25 C.F.R. § 502.11.

⁵⁸ 25 U.S.C. § 2703(7)(B)(ii); 25 C.F.R. § 502.8.

In other words, to qualify as Class II, CloudStreet Hold'em Poker must be a technologic aid to poker,⁵⁹ not an electronic facsimile of it. An electronic facsimile is “a game played in an electronic . . . format that replicates a game of chance by incorporating all of the characteristics of the game.”⁶⁰ In contrast, a technologic aid is a “machine or device that: (1) [a]ssists a player or the playing of a game; (2) [i]s not an electronic . . . facsimile; and (3) [i]s operated in accordance with applicable Federal communications law.”⁶¹ A technologic aid allows “a player to play a game with or against other players rather than with or against a machine.”⁶²

CloudStreet Hold'em Poker satisfies the first element of a technologic aid. It assists play by electronically displaying each player's hand. The hole cards and community cards are displayed on each player's electronic console, enabling the players to potentially decide whether to call, check, raise, or fold. Also prior to a player's turn, they may – when presented with the opportunity – use pre-action checkboxes to pre-select their action on the current bet. If the bet does not change prior to their turn, the gaming machine will utilize their pre-selection for their turn. The electronic game also uses a random number generator to shuffle and deal the cards, which enables play and avoids any human error. In these ways, the game assists both the players and the play of the game.

The second element of a technologic aid requires that CloudStreet Hold'em Poker not constitute an electronic or electromechanical facsimile of a game of chance.⁶³ As explained, 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 . . .”⁶⁴ In the *Digideal II* opinion, OGC 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.

In doing so, OGC examined court decisions on point. One case relied upon was *Sycuan Band of Mission Indians v. Roache*, in which the court reviewed a wholly-electronic pull tab game, where the player bought and played pull tabs generated by computer and displayed on a

⁵⁹ A prior OGC legal opinion and memorandum have explained this office's legal view that IGRA allows the use of technologic aids with Class II card games. *See, e.g.*, NIGC OGC Game Classification Opinion – “Net Poker Gaming System” at 4 (July 3, 2013), https://www.nigc.gov/images/uploads/game-opinions/2013.07.03_Ltr_to_Foley_fr_NIGC_re_NetPoker_Gaming.pdf; Memorandum to Acting NIGC Chair & Vice Chair, from Acting General Counsel re: Classification of card games played with technologic aids (Dec. 17, 2009) (*Digideal II* opinion), <https://www.nigc.gov/images/uploads/game-opinions/20091217MemoreClassificationofcardgamesplayedwithtechnologicaidstoNIGCActingChairmanGeorgeSki bine.pdf>. Given that this is the long-standing view of this office, there is no need to set forth those explanations in detail again. They are incorporated herein by reference.

⁶⁰ 25 C.F.R. § 502.8.

⁶¹ 25 C.F.R. § 502.7(a).

⁶² *Id.* (b)(3).

⁶³ 25 C.F.R. § 502.7(a)(2).

⁶⁴ 25 C.F.R. § 502.8.

video screen. The court concluded that the game was an exact, self-contained copy of paper pull tabs - an electronic facsimile – and that such a wholly contained game is different from the same game in live-form, played with the aid of a computer or video.⁶⁵ 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 a manner that resembled a three-reel slot machine.⁶⁶ The paper tabs, however, also could be played and redeemed manually.⁶⁷ There, the D.C. Circuit held that the machine was not an electronic facsimile, containing all characteristics of pull tabs, as the game was in the paper tabs and the machine was “little more than a high-tech dealer.”⁶⁸

Applying these principles, the *Digideal II* 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 folding, placing wagers, or putting in an ante were made by the player. And the opinion further contrasted the Digideal game with video poker machines, considered Class III electronic facsimiles, because they accept bets, deal, evaluate the hand against standard poker rankings, and pay winning hands according to pay tables. Video poker machines, at bottom, are exact, self-contained copies of poker, meaning electronic facsimiles.

As with *Digideal*, CloudStreet Hold'em Poker shuffles, deals, collects the pot, and displays the cards. The game also automatically makes the initial blind bets for those players. If players fail to act (within a twelve second timeframe), deciding when to call or check, when and how much to raise, and when to fold, the gaming machine takes action for the player – checking when there is no bet and folding when there is one. In essence, the game may potentially play itself without any player interaction, as it automatically makes the initial blind bets and if the third player fails to bet, will fold for that player. Subsequently, on the flop, if both remaining players fail to act, the machine will automatically check for both. On the remaining betting rounds (turn and river), if the players continue to fail to act, the machine will continue to check for both and then at showdown automatically display the players' cards, deeming the best five card poker hand the winner. In this scenario, the players are not playing the game or competing against one another. The machine plays the game, incorporating all the characteristics of Texas hold'em to do so. As such, it is a wholly contained copy of Texas hold'em poker in a machine; an electronic facsimile of it.

Alternatively, in the above scenario, if only one player acts on the flop and places a bet, but the other player does not, the machine will automatically fold for the second player. Then the game is over. When this occurs, the solo active player is playing the game with or against a machine, not other players. As such, the game is explicitly excluded from the regulatory definition of a technologic aid, permitting “a player to play a game with or against other players

⁶⁵ 54 F.3d 535, 542-543 (9th Cir. 1994).

⁶⁶ 230 F.3d 365, 370 (D.C. Cir. 2000).

⁶⁷ *Id.*

⁶⁸ *Id.*

Mr. Darren Keyes
Re: CloudStreet Hold'em Poker
May 13, 2020
Page 9 of 9

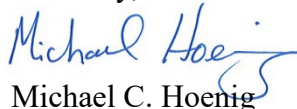
rather than with or against a machine.”⁶⁹ Like the *Sycuan* case, here, the game replicates the essential characteristics of Texas hold'em in an electronic form.⁷⁰ And, the game, therefore, constitutes an electronic facsimile. Further, given that the machine allows play of two separate games simultaneously and requires the player to tap a view window to toggle between the games, along with the twelve-second window of time for each player to act on their turn, the above scenarios of automatic machine play are likely.

The fact that the players make the initial buy-in does not save CloudStreet Hold'em Poker from being an electronic facsimile. As in *Sycuan*, where the players bought what the court found to be electronic replicas of paper pull tabs, likewise, here, the players' initial buy-in does not negate CloudStreet Hold'em Poker's ability to electronically play a complete game by itself or with one player playing with or against the machine.

Because CloudStreet Hold'em Poker is an electronic facsimile of Texas hold'em poker, it is a Class III game. Under IGRA, Class III games may be played only pursuant to an approved tribal-state compact. Please be advised that this legal opinion is only advisory and that it may be superseded, reversed, revised, or reconsidered by a subsequent General Counsel. Moreover, this advisory legal opinion is not binding upon the NIGC Chair or the NIGC Commission, who are free to disagree with it in any action that comes before them or via the Chair's prosecutorial discretion. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court. Further, by issuing this advisory legal opinion, the NIGC Office of General Counsel does not speak on behalf of the U.S. Department of Justice or the United States Attorneys in regard to their enforcement responsibilities.⁷¹

If you should have any further questions, please contact NIGC Of Counsel Jo-Ann M. Shyloski at (202) 632-7003.

Sincerely,


Michael C. Hoenig
General Counsel

⁶⁹ *Id.* (b)(3).

⁷⁰ *See, e.g.*, Letter to Mr. Robert Dowd, President, The Second Byte, from NIGC Acting General Counsel re: Fast Track Bingo at 5 (Sept. 3, 2009) (“Considering FTB as a whole, the system does not replicate bingo by incorporating all of the characteristics of the game into an electronic or electromechanical form. Essential features of bingo are not made electronic.”).

⁷¹ *See, e.g.*, 18 U.S.C. §§ 1166-1168; 15 U.S.C. §§ 1171-1178; 31 U.S.C. §§ 5361-5367.