COMMENTS OF THE SENECA-CAYUGA NATION OFFICE OF THE GAMING COMMISSIONER ON THE NATIONAL INDIAN GAMING COMMISSION'S PROPOSED REVISIONS TO ITS REGULATIONS

I. Introduction.

These comments are made in response to the topics of consultation published by the NIGC on its website and discussed via Zoom on September 21 and 22, 2021, and October 21, 2021. We are pleased to provide input on these proposed changes.

The Seneca-Cayuga Nation Office of the Gaming Commissioner ("SCOGC") therefore submits the following comments, which are included under the pertinent text of the consultation questions or revised language below.

II. Comments.

a. Audit Standards for Small and Charitable Gaming Operations – Part 571

1. *Elimination of NIGC Waiver Requirement for Reviewed Financial Statements in 25 C.F.R. § 571.12*

While initially presented as doing away with the "waiver requirement" in the information provided by the NIGC for this consultation series, we have a difficult time reading the NIGC's proposed revision to 25 C.F.R. § 571.12 (c) as alleviating a bureaucratic burden to the benefit of tribal governments. Instead, it appears that this provision is actually making it more difficult for small gaming operations to qualify under § 571.12 (c) by decreasing regulatory flexibility. Accordingly, the SCOGC believes that the elimination of the NIGC's authority to waive the requirement that financial statements must have been properly submitted for the previous three years by smaller gaming operations in § 571.12 (c) actually amounts to the elimination of a potential lifeline for smaller gaming operations rather than the elimination of a regulatory "requirement." Therefore, the SCOGC cannot support this proposed revision.

In the currently un-revised 25 C.F.R. § 571.12 (c), a gaming operation that has gross gaming revenues of less than $2 million during the prior fiscal year will satisfy the annual audit requirement of § 571.12 (b) if two conditions are met. The first condition is not at issue here, but the second condition states, "*[u]nless waived in writing by the Commission*, the gaming operation's financial statements for the three previous years were sent to the Commission in accordance with § 571.13." (Emphasis added).

As currently written, it appears that the regulation contemplates circumstances where the NIGC may waive the requirement that a gaming operation's financial statements must be sent to the NIGC for the three previous years in accordance with § 571.13. The proposed regulatory changes here do not eliminate a "Commission waiver requirement" because there is no requirement that the NIGC waive anything before small gaming operations are authorized to submit reviewed

(rather than audited) financial statements. Instead, the NIGC is proposing to do away with a tool that could be used by smaller gaming operations that have just commenced business operations within the past three years or have otherwise been impacted by some disaster outside of their control that rendered them unable to meet all necessary regulatory requirements within the past three years (i.e., a global pandemic). In other words, we do not view this proposed regulatory change as necessarily beneficial to smaller tribal gaming operations and prefer to keep the current language which maintains some semblance of flexibility in the financial reporting process. We have the same opinion to the proposed revision to § 571.12 (e)(4).

Moreover, before § 571.12 (c) was promulgated and was still in the rulemaking phase, the NIGC proposed an additional requirement to this section mandating that a tribal government "submit a statement to the Commission supporting the decision to use reviewed financial statements in place of audited financial statements."[1] However, this requirement was removed from the final rule after the NIGC agreed with several commenters' objections to this requirement as being "unnecessary" and "vaguely worded."[2] Further, the commenters stated, and the NIGC agreed, that "the requirement could cause further non-compliance as tribal governments attempt to understand the scope of what is required[.]"[3] We believe that any new requirement that a TGRA inform the NIGC of "permission" to submit a review of the financial statements may encounter similar issues.

Lastly, the SCOGC is concerned with how the proposed § 571.12 (c) would interact with § 571.12 (d) and (e). Subsections (d) and (e) deal with the submission of consolidated financial statements of multiple gaming locations if particular conditions are met. We are trying to understand how these sections can be navigated if a tribal government has multiple gaming operations, some generating more than $2 million per year, while some are small and/or charitable gaming operations. We would appreciate clarification how the NIGC proposes to mesh these sections if the proposed revision to § 571 (c) is adopted. Would tribal governments be able to put their gaming operations into different baskets, so to speak, or if a tribal government chooses to consolidate small gaming operations under 571.12 (e), will they still be able utilize the proposed § 571 (c) or (f) for any other applicable small/charitable gaming operation? Essentially, does the NIGC envision a scenario where a tribal government can pick and choose how it submits financial information to the NIGC from any combination of § 571 (b) – (f)?

2. *Options For Financial Reporting by Charitable Gaming Operations*

The SCOGC is generally supportive of the NIGC in its efforts to create a third tier of financial reporting for charitable gaming operations under its regulations. Promulgating standards for charitable gaming operations that are less burdensome than those for tribal gaming (generally), or those for qualifying small gaming operations could facilitate an increase of charitable gaming in Indian country. We believe that encouraging charitable gaming as a way of raising money for certain tribal or community-based causes is aligned with the central purposes of IGRA. However,

[1] *See* Amendments to Various National Indian Gaming Commission Regulations, Proposed Rule, 73 Fed Reg. 75242, 78251 (Dec. 22, 2008).
[2] Amendments to Various National Indian Gaming Commission Regulations, Final Rule, 74 Fed. Reg. 36926, 36932 (July 27, 2009).
[3] *Id.*

we are concerned that the NIGC's proposals here may not go far enough to promote widespread utilization of this third tier of financial reporting.

First, the SCOGC believes that the $50,000 gross revenues threshold may be unnecessarily low. In the NIGC's October 21, 2021, virtual consultation, Chairman Simermeyer and NIGC attorney Steve Iverson stated that this number was reached after reviewing financial reporting waiver requests, and finding that many fell below this $50,000 amount. It was also stated that in the formulation of this threshold, that the size of a gaming operation was an important factor in assessing the risks present with that operation's gaming activity. While this certainly helps provide context for why the proposed $50,000 gross revenues threshold was chosen, we still believe that increasing this number, even to just $100,000, will have positive effects for tribal governments, tribal members, and communities and causes outside of Indian country. In short, if the NIGC can better promote charitable gaming through its regulatory scheme, then the SCOGC considers it a win for all involved, and we believe that increasing the proposed $50,000 threshold does just that.

Second, we do not believe that there should just an Option 1 ***or*** an Option 2. We believe that, as discussed below, charitable gaming operations that have been in operation for less than three years will automatically benefit more from Option 1, while those that have been in operation, and compliant with § 571.13, for three years would benefit more from Option 2. Accordingly, we believe that in order to encourage new charitable gaming operations and their continued existence, and to encourage already established charitable gaming operations, that both options should be available to tribal governments. The NIGC seemingly has some level of comfort with both options, and while some form of communication between a tribal government or TGRA and NIGC would be required so the NIGC would be aware of which option a charitable gaming operation is taking, we believe that having both tools available would create more positive outcomes for a wider variety of tribal governments.

A. Option 1 –

The first option proposed by the NIGC provides that the annual audit requirement in § 571.12 (b) will be satisfied if a charitable gaming operation delivers detailed information regarding its activities to its TGRA monthly. Subsequently, the TGRA would be required to provide the NIGC with a yearly certification that the financial information from the charitable gaming operation has been reviewed, gaming has been conducted in an appropriate manner, and net gaming revenues have been appropriately expended. The SCOGC is particularly supportive of this Option, as it permits new charitable gaming operations to be subjected to less rigorous requirements than submitting audited financials per § 571.12 (b), but without the requirement that they have complied with § 571.13 for the previous three years.

However, the SCOGC is concerned with the level of authority the NIGC Chair has in determining that this less-onerous standard is no longer available to an otherwise compliant charitable gaming operation. Under Option 1's proposed § 571.12 (f)(4), it states that "[t]he Chair of the NIGC may, at his or her discretion, require any gaming operation subject to this paragraph (f) to comply with the annual audit requirement of paragraph (b)." The SCOGC is concerned that this proposed revision gives unilateral authority to the NIGC Chair to revoke the status of a charitable gaming operation that otherwise meets the requirements for this third tier of financial reporting without

any standards to base his or her decision on. Without any such standards written into the regulatory provision for when subsection (f) would not be available, charitable gaming operations would be at the total mercy of how an NIGC Chair feels about a charitable operation at any given time. Without any standards to base its decision on, this would also place the NIGC at risk of assertions of arbitrary and capricious decision-making. In fact, the proposed subsection (f) in Option 1 could essentially be written out of the NIGC's regulations for *all* prospective and otherwise qualified charitable gaming operations by a future NIGC Chair if he or she so chooses. Therefore, while the SCOGC prefers Option 1 (if we *must* pick between 1 and 2), this proposed regulatory change seemingly contains an on/off switch provision that we simply cannot support.

B. Option 2

The SCOGC appreciates how the NIGC has drafted its proposed Option 2 due to it being concise and relatively straightforward, admittedly an extremely difficult thing to do when drafting regulations. However, we read this provision as being an impossible threshold to meet unless a charitable gaming operation has been operating for at least three years. We are also concerned that the language in Option 2 – section (f)(2) may lead to inadvertent noncompliance with this section due to the vagueness of the requirement that "the tribe or TGRA informs the NIGC of such permission [to submit review of financial statements]."

We could be more supportive of this Option if it operated with the use of a double-negative (i.e., no non-compliance), such as the gaming operation has received no notice of violation from the NIGC concerning non-compliance with § 571.13 for the previous three years. Accordingly, we believe that Option 2 works best if it is an alternative available concurrently with Option 1, so that the establishment or continuation of charitable gaming operations are encouraged no matter how recently those operations have commenced gaming activities.

b. Audits – Parts 571.12 and 571.13

1. Adverse and Disclaimed Opinions

The SCOGC is deeply concerned with the proposed amendments to 25 C.F.R. §§ 571.12 (b)(3), (d)(5), and (e)(5) that specify that either a disclaimed opinion or adverse opinion does not satisfy the audit submission requirements. This is especially so when considering how this proposed revision, coupled with the clarification that an audit report and opinion would be required in proposed §§ 571.12 (b) and 571.13 (a)-(c), would change the NIGC's current practices. It appears to us that these proposed revisions are really just creating another potential avenue of non-compliance, as we do not believe that this is simply a clarifying edit to reflect the NIGC's current practices. In other words, before we can get behind this proposed revision, we request additional clarification regarding how the NIGC currently handles the submission of adverse and/or disclaimed opinions, and what the consequences would be – especially for consolidated audits – under the NIGC's proposed revisions to these provisions.

2. Clarification that Audit Report and Opinion Are Required Submissions

As stated above, the SCOGC is concerned with the proposed amendments to 25 C.F.R. §§ 571.12 (b) and 571.13 (a)-(c), as it seems to increase a tribal government's exposure to an enforcement action in an area in which a tribal government does not exert total control. Accordingly, the SCOGC requests that the Commission provide information regarding how it currently handles these regulatory sections, and whether an enforcement action would currently be initiated against a tribal government if an auditor does not express an opinion on a tribal government's financial statements.

3. Prerequisites for Consolidated Audits

A. Only Operations with the Same Owner May Be Consolidated

The SCOGC does not object to the proposed revision here clarifying that consolidated audits under 25 C.F.R. § 571.12 (d) and (e) may only occur if the gaming operations share a common owner.

B. Clarifying "Facilities" and "Operations" Are Synonymous

While the SCOGC agrees with the Commission's intent in clarifying that gaming facilities and gaming operations are synonymous in the proposed 25 C.F.R. § 571.12 (d), we disagree with how the Commission is communicating this. The proposed 25 C.F.R. § 571.12 (d) seems to indicate that the terms are not synonymous, but instead have two distinct meanings. This is inferred from the Commission's proposed language because both terms are still included in the proposed revision.[4]

We believe that the intention of the Commission would be better served by amending the definitions section of the Commission's regulations to flatly state that gaming operations and facilities are synonymous with each other. This would provide greater clarity throughout the Commission's regulations, and the Commission would not have to include both terms in § 571.12 (d) as currently proposed. On the other hand, it is not apparent that the terms are, in fact, synonymous. In our view, a gaming facility is the location where gaming activities take place while a gaming operation encompasses the overall management structure that operates the gaming facility. A gaming operation may operate one gaming facility or it may operate multiple gaming facilities. It is nonetheless a single operation.

4. Delegation of Waiver Granting Authority

While the SCOGC is in favor of streamlining waiver requests under 25 C.F.R. § 571.12 (d)(4) and (e)(3) by permitting the Commission to delegate waiver authority to another department, the SCOGC feels it necessary to clarify which entity or entities may serve as the Commission's designee(s). Without knowing the realm of possibilities regarding who this designee may be, we are uncomfortable supporting this proposed revision. Will there be any possibility of appealing the designee's decision in denying a waiver request? Will there be any specific standards the designee must follow in deciding whether to grant a waiver? At the very least, there is quite a lot of communication between tribal governments and the NIGC through consultations, etc., so how

[4] Proposed 25 C.F.R. § 571.12 states, "If a tribe has multiple *gaming facilities, or operations* on the tribe's Indian lands . . ."

will we be sure that the designated entity can be held accountable for its decisions, or at least be receptive to tribal input where appropriate? These are only some of the questions that immediately arise when an agency is granting itself blanket authority to delegate important functions to an infinite number of potential designees.

Accordingly, the SCOGC believes that greater specificity is needed to clarify which entities may be delegated the authority to approve or deny waiver requests under § 571.12 (d)(4) and (e)(3). It is presumed that the designee would be "designated Commission staff," but we believe it is critical that the NIGC identify the potential designee in these regulations so that tribal governments may understand who may exert waiver granting authority over its gaming operations.

c. Self-Regulation of Class II Gaming – Part 518

1. "Section 518.2 states that the Office of Self-Regulation will administer the self-regulation program on behalf of the Commission. To clarify and expand the Office of Self-Regulation's role in the process, the Commission is proposing the following revisions to Part 518:"

> a. "Section 518.11 – Instead of the Commission receiving notifications of material changes from self-regulated tribal governments, the Office of Self-Regulation will be the entity that self-regulated tribal governments must notify. Also, consistent with the Commission's remaining investigatory and enforcement authority once the Commission issues a certificate, the Office of Self-Regulation may request information from a self-regulated tribal government;"

While the SCOGC does not object to amending the regulations to make the Office of Self-Regulation the entity that self-regulated tribal governments notify of relevant information, we are concerned about several logistical matters raised by the contents of § 518.11, as proposed.

Primarily, we are concerned that the regulation, as written, provides for information collection that is overly broad. The SCOGC understands that "information relevant to any material change in circumstances" affecting a tribal government's continued eligibility for self-regulated status may be of use to the NIGC in their statutory duties. However, stating that tribal governments are required to also provide "information that may lead to information that is relevant to any material change in circumstances" is ambiguous and, most importantly, does not rise to the standard of information that would impact the tribal government's continuing ability to self-regulate. Accordingly, we would strongly recommend that the NIGC limit the amount of information that the Office of Self-Regulation has the authority to request under this section.

> b. "Section 518.13 – The Office of Self-Regulation will become the proponent of any case to revoke a certificate before the Commission, and will provide any recommendation to revoke a certificate to the Commission and the tribal government…"

The SCOGC is of the opinion that, if the Office of Self-Regulation is to become the point of contact for tribal governments holding a certificate of self-regulation, it would naturally follow that the

Office of Self-Regulation also "become the proponent of any case to revoke a certificate before the Commission." We are also particularly pleased that the NIGC has suggested amendments to the regulation that would clarify that the burden to prove that a certificate of self-regulation should be revoke is in turn held by the Office of Self-Regulation. However, we are concerned that, especially in the context of the Office of Self-Regulation's current composition, the proposed regulation, as written, presents certain due process concerns.

Specifically, it is our understanding that the Office of Self-Regulation is currently only staffed by one person, the Director, who also currently serves as a Commissioner on the NIGC. While we respect the Commissioner's dedication to the cause of strong tribal self-governance, we are concerned that it would offend tribal governments' due process rights to have one such individual both making an argument for why a certificate of self-regulation should be revoked and then voting on whether that argument proved that revocation was warranted by a preponderance of the evidence. Accordingly, we would recommend either 1) staffing the Office of Self-Regulation to the extent that employees and/or teams within the office could present arguments to the Commission as the proponent of a revocation action, or 2) requiring that any person in the Office of Self-Regulation who also serves as an NIGC Commissioner abstain from the final vote on whether a tribal government's certificate of self-regulation should be revoked.

Finally, we would recommend against omitting language from the regulation that outlines how the Office of Self-Regulation determines that a tribal government "no longer meets or did not comply with the eligibility criteria" for self-regulation. Specifically, we would recommend including language outlining 1) the information utilized to bring about consideration of such a determination, 2) the process by which information is considered prior to the determination, and 3) the standard for making such a determination.

d. Fees – Part 514

1. "The Commission proposes exploring options for including a mechanism within the NIGC fee regulations to adjust the assessed fiscal year in response to extreme and unexpected variations in assessable gross revenues. The assessed fiscal year is defined by NIGC fee regulations as the gaming operation's fiscal year ending prior to January 1 of the year the Commission adopted fee rates. This definition is intended to result in all gaming operations applying the same fiscal year's audited revenues to the same fee rate, but it also results in at least a calendar year transpiring between the end of the assessed fiscal year and a fee payment calculated using that fiscal year. Thus, during the pandemic, fee payments were calculated using pre-pandemic assessed fiscal years and post-pandemic, fee payments will be calculated using pandemic impacted assessed fiscal years. The Commission seeks tribal input, feedback, and suggestions on a mechanism to adjust the assessed fiscal year to address these concerns in response to extreme and unexpected variations in assessable gross revenues."

While the SCOGC supports the NIGC's intent to adjust its fee structure to account for "extreme and unexpected variations in accessible gross revenues," we would request that the NIGC engage

in further consultation with tribal governments at such point as it has developed a formal approach in that regard.

In any proposed revision to this effect, we believe that it would be both necessary and practical to define within the regulations what would constitute an "extreme" and/or "unexpected' variation in assessable gross revenue. As to defining "extreme," we would recommend including specific qualifying numerical figures in the regulation. For example, the NIGC may determine that any tribal government that experiences a 20% loss in month-over-month revenue for any month in a quarter would qualify for adjustments to their quarterly fee assessment. We would recommend defining "unexpected" in a manner that would encompass traditional force majeure events and allow space for novel circumstances such as the COVID-19 pandemic, so as to be inclusive of the varied experiences of gaming tribal governments. For example, unexpected and/or extreme variations could be the result of government action or restriction, public health guidance, natural disasters, suspensions of utilities, or cessation of other emergency or sanitation services. As such, we would recommend drafting the regulation using "including, but not limited to" language so as not to limit relevant circumstances that would affect a tribal government's ability to pay an assessed fee, whether it be based on previous years or whether it is assessed while a tribal government is recovering from a hardship.

> 2. "The Commission proposes mandating a process for reporting on the amounts the NIGC has available to carry over at fiscal year-end. The Indian Gaming Regulatory Act provides that fees "shall be available to carry out the duties of the Commission, to remain available until expended." 25 U.S.C. § 2717a. In addition, the Commission proposes requiring that NIGC budget commitments maintain a two-quarter transition fund. This reporting and budget requirement is intended to better inform tribal governments of the NIGC budget and to better prepare the NIGC for unexpected budgetary impacts."

The SCOGC supports this proposition, which would make public the amount of funds rolled over at fiscal year-end. The SCOGC is also of the opinion that it would be in keeping with the NIGC's strategic goals to increase reporting overall in relation to 1) the funding the NIGC receives, and 2) how the NIGC utilizes such funding. We would recommend, then, that the NIGC publish an annual report that includes the amount of funds rolled over, as well as detailing the various projects that the NIGC undertook with the funds utilized during that fiscal year.

As to the specific report in question, the SCOGC would recommend that the NIGC include therein 1) whether the rolled over amount will go towards reducing the amount in fees assessed against regulated tribal governments in the following year, and/or 2) what specific purposes the funds will be used for. If the rolled over funds are to be used for various purposes, we would strongly recommend outlining in the report what amount of money and what percent of the rolled over funds will be apportioned for each purpose.

The SCOGC is also not opposed to the proposition of "requiring that NIGC budget commitments maintain a two-quarter transition fund." Indeed, we believe that maintaining such a fund would help ensure that, even in the event of a federal government shut down, tribal governments would maintain access to valuable regulatory resources. However, should the NIGC determine to

mandate such a fund, we recommend specifically outlining within the regulations what circumstances would warrant making expenditures from the emergency fund. Moreover, we recommend including a requirement within the regulation requiring that, for each time that the NIGC utilizes the emergency fund, the NIGC sends written notice to regulated tribal governments explaining the nature of the expenditure.

> 3. "The Commission proposes revising the fee regulations to incentivize electronic submission of fee payments, provide for flexibility in quarterly payments under certain circumstances, and provide guidelines for the fee rate calculation for self-regulated tribal governments. The Commission believes that increased adoption of electronic submission of fee payments will result in administrative cost savings for both the NIGC and tribal gaming operations and seeks tribal input on a means to incentivize electronic payment adoption. The Commission further proposes exploring options for providing gaming operations with increased flexibility in the timing of the quarterly payments in response to extreme industry-wide impacts such as the global pandemic. Finally, the Commission seeks tribal input on fee rate calculations for self-regulated tribal government and whether additional guidance or regulatory changes are warranted to incentivize self-regulation."

First, we would like to note that the SCOGC supports the NIGC's proposed efforts to incentivize electronic fee payments. While we believe that the best incentive for using electronic methods would be to provide a discount on fees due each time that a tribal government utilizes the electronic method, we are also of the opinion that ensuring that any online payment system was accessible and secure would prove to increase utilization. In order to ensure that regulations are workable for those who are regulated, and in turn that the NIGC receives the funding it is due, it is imperative to ensure that each tribal government is able to easily remit its quarterly fees in the manner most comfortable to them. Accordingly, we would recommend that the NIGC engage in education and information sharing with tribal governments prior to fee deadlines to explain the various available payment options, as well as their benefits and drawbacks.

As outlined above, we are largely in favor of regulatory revisions written to provide flexibility in quarterly payments for tribal governments experiencing hardship, and we would be remiss not to emphasize again here that we believe such flexibility should not be limited to circumstances affecting the entirety of the tribal gaming industry.

We would recommend adopting regulatory language that would allow for flexibility, in the form of a payment extension or payment plan, in the amount and date of remittance of quarterly fee payments for any tribal government who requests such flexibility on the basis of an unexpected or extreme circumstance that led to a marked decrease in gaming revenue. Due to the extraordinary nature of these requests, we would recommend that the NIGC establish by regulation that 1) such requests shall not be unreasonably denied by the NIGC, and 2) that tribal governments must only provide an attestation of hardship, not proof of financial or other supporting documents, in order for their request to receive consideration-- allowing immediate relief in the event of a sudden emergency or under circumstances where a tribal government's attention must be completely dedicated to the situation at hand.

e. Appeal Proceedings – 25 C.F.R. Subchapter H

1. *Power of the Chair to Respond to Motions Under 25 C.F.R. § 585.4 (b)*

While the SCOGC understands the NIGC's desire to have the Chair respond to motions filed in appeals proceedings before it, we are hesitant to support the NIGC's proposed revision to 25 C.F.R. § 585.4 (b). To us, it seems likely that any response motion submitted by the Chair per this proposed revision would be purely adversarial in nature. If the Chair agrees with the content of a motion permitted under § 585.4 (a), it seems unnecessary for the Chair to respond to any such motion, instead the Commission would just rule on the motion – which will undoubtedly include the views and opinions of the Chair. In short, we believe that as contemplated by the proposed 25 C.F.R. § 585.4 (b), the adversarial nature of any such motions in response filed by the NIGC Chair will have a negative effect on the real and/or perceived integrity of the NIGC's appellate process.

Under the proposed § 585.4 (b), it seems that the Chair will have to vote (even if the vote is to abstain) with the other member(s) of the NIGC to determine whether the Chair is granted leave from the Commission to respond to the potential motions enumerated in § 585.4 (a). Without any requirement for the Chair to abstain from this initial vote, the Chair will be able to wield tremendous power in the NIGC's determination of whether, and to what extent, the Chair may respond to a given motion in a proceeding before it. We believe that if the Chair is going to act in an adverse capacity against an appellant tribal government, he or she (the Chair) should be required to abstain from the Commission vote determining whether to permit the Chair from responding to a motion. Indeed, it is predominantly the Chair's decisions (and only the decisions of the Chair) that are being appealed in first place under this Part. *See* 25 C.F.R. § 585.1.

However, seemingly authorizing the Chair to participate in the Commission's vote to grant the Chair authority to respond to motions is a minor issue compared to the other practical effects of the NIGC's proposed revisions to § 585.4 (b). Supposing that the Chair is granted leave to respond to a motion in an appellate proceeding before the Commission, the proposed § 585.4 (b) creates a situation where the Chair will then have to rule on his or her own responsive motion as a part of the larger NIGC body. While we understand that the Chair, and the NIGC as a whole, already play quasi-prosecutorial and quasi-judicial roles under the NIGC's regulations, the SCOGC believes that permitting the Chair to rule on his or her own motions, especially in light of the current composition of the NIGC, undermines the real and/or perceived integrity of the NIGC's appellate process in Part 585. We believe that this also exacerbates an existing inequity in the NIGC's appellate process where the Chair is allowed to vote on whether to overturn or reverse his or her initial decision.

Under 25 U.S.C. § 2704 (d), two (2) members of the Commission, at least one of which is the Chairman or Vice Chairman, constitutes a quorum. At present, the NIGC is comprised of only

two members, Chairman Simermeyer and Vice-Chair Hovland.[5] It is necessary to add that it takes a *majority* vote of the Commission to overturn an initial decision of the Chair.[6]

With this background, the SCOGC can reasonably foresee a situation in which the Chair exerts ultimate authority on essentially *every* part of the enforcement action process without any checks whatsoever. In this circumstance, the Chair assesses a civil fine against a tribal government under Part 575,[7] and the tribal government appeals the decision per Part 585. The tribal government then submits a motion to supplement the record, and the two-person Commission (including the Chair) grants the Chair leave to file a motion in response. After filing competing motions – one from the tribal government and one from the Chair, the Commission (including the Chair) will have to make a decision on the motions. After ruling on competing motions – one of which is the Chair's – the Chair and other member will have to decide on the actual disposition of the appeal. Because it takes a *majority* vote of the Commission to overturn an initial decision of the Chair, the Chair would either have to recuse himself on his own volition or agree to reverse his earlier decision for any appeal to have a chance at success. Without any of these actions, the appeal is largely useless since in the absence of a majority vote to overturn the Chair's initial decision, that initial decision stands.

We believe that with increased power there must be some accompanying check to that power. The SCOGC is of opinion that supposing that the Chair is granted leave to submit his own response motions in appeal proceedings, the Chair should be required to recuse him or herself from the ultimate decision on the competing motions. In addition, we believe that the Chair should recuse himself from the ultimate decision on appeal since it is his initial determination that is being appealed. In summation, if the proposed § 585.4 (b) is promulgated, the SCOGC is concerned that without any requirement for the Chair to abstain or recuse him or herself from the Commission vote to grant the Chair leave to respond to motions, or the Commission's decision on competing motions, or the ultimate decision before the Commission in an appellate capacity, this will increase the already existing imbalance of power among the Chair and other NIGC members during the appellate process. We believe that this increasing imbalance of power among NIGC members will have negative effects on the actual and perceived integrity of the NIGC's appellate process as the Chair essentially becomes the ultimate arbiter of his or her own decisions. Thus, if the Commission desires to permit the Chair to respond to motions made on appeal, the SCOGC encourages the Commission to adopt appropriate checks in its proposed revised regulations to ensure that the Chair is not playing the role of prosecutor, judge, and jury in the first instance, and when his or her decision is appealed, prosecutor, judge, and litigant in the second.

2. *Structure of Settlement Proceedings On Written Submissions to the Commission*

[5] The purpose of these statements is not to cast doubt on the integrity of the current NIGC members. We simply believe that it is reasonable to assume that at some point in the future, the NIGC will be operating with only two members again and those future members would be bound by these proposed regulations should they be promulgated.

[6] *See* 25 C.F.R. § 580.11 ("In the absence of a decision of a *majority* of the Commission within the time provided, the Chair's decision shall constitute the final decision of the Commission[.]").

[7] Or any of the final decisions appealable per 25 C.F.R. § 585.1 (a).

The SCOGC does agree with the proposed addition to 25 C.F.R. part 585 concerning settlements upon appeals before the NIGC. Having a process that a tribal government and the NIGC can reference for settlement negotiations will be mutually beneficial to both parties. However, we do ask the Commission to reconsider the deadline of five days before the commencement of a proceeding so long as both parties jointly move to stay the proceeding. Settlements are generally beneficial to both parties, and we do not believe that the Commission should create arbitrary time frames for requests to enter into negotiations. We do request, however, that the Commission consider adding a provision to this proposed subsection stating that the Commission will consider any and all such requests to enter into settlement negotiations in good faith.

f. Powers of the NIGC – 25 U.S.C. § 2706(b)(3)

1. "…[W]hat are Tribes' views on who warrants backgrounding? Should the determination be made based upon access as described above, job duties, a ten percent or more ownership interest in the company, or all of these criteria? And how should these criteria be qualified or defined? Should access be limited to routine access? What job duties do Tribes believe warrant backgrounding? What other factors, if any, should be considered? Further, must licenses be issued to these individuals?"

While the SCOGC would be generally supportive of the promulgation of regulations clarifying the meaning of the terms "Key Employee" and "Primary Management Official," especially in light of the new constraints regarding backgrounding capabilities under the Memorandum of Understanding ("MOU") between Tribal Gaming Regulatory Agencies and the NIGC concerning criminal history record information ("CHRI,") we would be deeply concerned by any changes that would reach persons other than those employed by the gaming operation either directly or contractually. Particularly, we do not believe that vendor licensing is an appropriate topic for federal rule making.

With regard to employee licensing, we are generally in favor of the proposed expansions here because we believe that permitting tribal governments to opt into processing individuals other than those individuals in those positions that currently constitute Key Employees and Primary Management Officials has the potential to streamline regulatory processes and produce cost savings. However, we believe it is of the utmost importance that any regulations drafted in this regard be done so in a manner that preserves the ability of each tribal government to determine which positions should be licensed or otherwise processed.

As to which positions TGRAs should be given the discretion to process through the NIGC and license, we would recommend including all employees of a gaming operation who have physical or logical access to a gaming operation or facility who 1) are in a position of trust, as defined by the tribal government's regulations, policies, or procedures, or 2) who have independent access to secure areas of the gaming facility for purposes related to the conduct of gaming.

If the NIGC were to proceed to promulgate regulations concerning licensing of business entities, any rulemaking must be sensitive to the distinctions between vendors, as risk levels vary according to the role of the vendor, as well as the nature of the vendor entity itself. It is the SCOGC's opinion that TGRAs know best what protections and safeguards are necessary and prudent to protect the

integrity of gaming in the context of vendor licensing. Accordingly, we are concerned that any federal rulemaking on the matter would create, rather than mitigate, confusion and potential risk. We respectfully recommend, then, that the NIGC refrain from promulgating regulations in this area.

> 2. "As to Class III gaming, compacts may require some states to conduct significant background investigations on prospective vendors. Those states typically maintain a matrix of approved vendors. Should the NIGC exempt individuals from state-approved vendors from the background investigation process? Or limit the investigation requirements? What do Tribal governments suggest should be included for limited investigation submissions?"

Should the NIGC elect to promulgate regulations concerning vendor licensing, the SCOGC would not oppose the inclusion of certain exemptions for state-approved vendors. As expressed above, though, the SCOGC would oppose promulgation of any regulations in this regard.

III. Conclusion

The SCOGC appreciates the opportunity to participate in consultation with the NIGC by providing the comments herein, and we are grateful for the NIGC's consideration of our comments, as well as those of other tribal governments. The SCOGC further looks forward to continuing to engage in meaningful consultation with the NIGC on these matters throughout the revision process. We are confident that such collaboration will result in promulgation of regulations that will benefit the tribal gaming industry and Indian county, as a whole.