



Mashpee Wampanoag Tribe
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February 11, 2011

VIA EMAIL TO: reg.review@nigc.gov

Chairwoman Tracie L. Stevens
Vice Chair Steffani A. Cochran
Associate Commissioner Dan Little
National Indian Gaming Commission
1441 L St., NW, Suite 9100
Washington, DC 20005

Attn.: Ms. Lael Echo-Hawk

Re: Response to Notice of Inquiry and Request for Information: Notice of
Consultations (75 Fed. Reg. 70680 (Nov. 18, 2010)).

Dear Chairwoman Stevens, Vice Chair Cochran and Associate Commissioner Little:

The Mashpee Wampanoag Tribe (the "Tribe") hereby submits the following comments in response to the NIGC's November 18, 2010 Notice of Inquiry, and appreciates the opportunity to make its views known. The Mashpee Wampanoag Tribe, whose relationship with the United States government was affirmed in 2007, does not yet have a trust land base and is not yet conducting gaming, but hopes to have an opportunity to do so in order to provide the services long denied to its citizens. As such, it is interested in the Commission's intentions to review and evaluate existing regulations.

As a first matter, the Mashpee Wampanoag Tribe urges the Commission to adhere to the principle that the Tribes bear the primary responsibility for regulating their own gaming operations. It is our observation that previous Commission regulations have exceeded the Commission's responsibility of setting regulatory goals by interposing detailed regulatory methods on tribal gaming commissions. Rather, the National Indian Gaming Commission would better serve Indian country by identifying core regulatory goals through which tribal regulators could best safeguard the interests of the tribe and the gaming public in maintaining the integrity and security of the each gaming operations. In turn, the Tribal regulators should be free to choose from a range of methods – perhaps aided by a clearinghouse and training resources provided by the

NIGC, to most effectively address the circumstances of their own facilities – both as to size, location and available resources.

Once the NIGC has identified the priorities of which regulatory areas it intends to address over the next two years, we urge that the Commission adopt a process that respects the sovereignty of tribes, the primacy of their regulatory bodies, and the expertise that tribes have developed in the years of operating and regulating their gaming facilities. We suggest that any evaluation of specific regulatory provisions engage tribal regulators and operators to the fullest extent possible, with the goal of achieving the best information available for the decision process. In the past, the NIGC has been reluctant to acknowledge the expertise of the tribal gaming industry, and has not always accepted or fully implemented considered comments. We are hopeful that this Commission is more willing to supplement its own knowledge by fully exploiting the tribal resources available to develop and improve regulatory provisions.

Priorities:

1) Class II regulations

The Tribe is aware that the previous Commission undertook extensive efforts to promulgate Class II Technical Standards (25 C.F.R. § 547, in effect) and Class II MICS (15 C.F.R. § 543, effective date postponed). The Tribe is further aware that the previous regulatory process, including Tribal Advisory Committees was substantially enhanced through the input of a tribal gaming working group that worked alongside the Tribal Advisory Committees to provide technical expertise and comment. Many of those comments were implemented in the final drafts of the Technical Standards and MICS, respectively, but many suggestions were summarily dismissed. As the Tribe enters into the process of seeking a class III compact from the Commonwealth of Massachusetts, it is aware that the availability of a robust class II alternative may mean more than theoretical bargaining power, and may turn out to be the Tribe's primary option for economic development. It is therefore concerned that some aspects of the Technical Standards and MICS require further attention to ensure that they are consistent with best practices of class II technology and regulation because of some shortcomings in the previous regulatory development and to reflect technological advancement in the time elapsed since the regulations were drafted. We urge that the process for review and revision of this extremely important area be carried out in a manner to utilize all possible expertise and resources. If the NIGC were to employ a Tribal Advisory Committee in this process, the selection of Tribal Representatives should ensure expertise in relevant technological issues and include experienced class II regulators and operators. The Committee process should be designed to be open to those interested in facilitating the broadest possible exchange of expertise and comment as part of a tribal consultation process before draft regulations are published.

2) Class III MICS

The Tribe believes that NIGC Class III MICS pose significant problems. As a preliminary matter, the Tribe is concerned that the NIGC comply with the jurisdictional limitations recognized in Colorado River Indian Tribe v. NIGC, 466 F. 3d 134 (DC Cir. 2006). At the very least, that decision imposed limits on the NIGC's authority to enforce

any class III MICS, and that limitation should be reflected in the Commission regulations. The Tribe is aware that Class III MICS can serve as guidance; generally, to

tribes seeking to develop their own class III regulations, but tribes may also benefit should the NIGC compile tribal class III regulations and make those available in a clearinghouse to tribes, like Mashpee newly embarking on class III operations. Mashpee looks forward to benefitting from the expertise developed across Indian Country as well as that offered by the NIGC. The Tribe expects to draw from all of those sources in developing compact terms and its own tribal regulatory environment. The Tribe is aware that others have chosen to adopt NIGC Class III MICS either through compact provisions or tribal ordinance, but firmly believes that the determination to do so is one belonging to the Tribe as sovereign, and cannot be imposed as the NIGC.

The existing Class III MICS (25 C.F.R. § 543) should be reviewed and revised. Even if the NIGC Class III MICS are advisory only, they should incorporate the best possible model. The Tribe is aware that the MICS, in their current form, impose specific methods to achieve broad regulatory goals. As such, such MICS must be regularly revised and updated. Such specific requirements, moreover, risk precluding equally acceptable methods of achieving the required protections. The Tribe believes that the current MICS would benefit from careful review and revision. As with the Class II regulations discussed above, the Tribe believes that the best process would be one that takes full advantage of the expertise generally developed beyond that possessed by Commission staff. As with the Class II regulations, should the NIGC choose to utilize a Tribal Advisory Committee, then the process should encourage the broadest possible use of all expertise available –beyond the NIGC and beyond TAC membership – to achieve the best possible product to assist tribal regulators in protecting the integrity security of class III gaming operations. Evaluation of class III MICS should encourage tiered regulation, reflecting the varied range of gaming operations, and avoid burdening modest facilities by mandating that all facilities use only the most sophisticated and expensive means of compliance. Indeed, it would be preferable if the MICS were to set forth regulatory goals and provide examples or guidelines for compliance rather than require uniform methods of achieving those goals.

3) Gaming Facility License Regulations

The NIGC's Gaming Facility License Regulation (25 C.F.R. Part 559) should be withdrawn as improperly promulgated, both as to procedure and substance. The Gaming Facility License Regulations were imposed by the prior Commission without adequate tribal consultation and with a scope far in excess of the Commission's authority under the Indian Gaming Regulatory Act (the "IGRA"). The rules mandate tribal action not contemplated by IGRA, and improperly intrude the Commission into the Tribe's obligation to license its own facilities. Should the Commission determine to retain some form of the Gaming Facility License Regulation, it must be greatly revised to comport with the provisions of the IGRA and to reflect the primary regulatory responsibility of tribes, including the tribe's statutory responsibility to protect the public health and safety. The NIGC should engage in consultation with tribes specifically addressing the appropriate scope and content of any Facility License regulation, and should not attempt to expand its own statutory authority. Once such consultation has focused the inquiry, the Commission should consider crafting any new regulations through negotiated rulemaking.

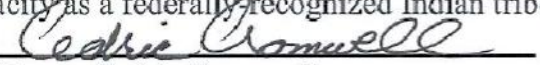
As the Commissioners have noted in the public consultations, time is too limited to accomplish a complete range of regulatory reform. The Tribe believes that the areas

noted above are most urgent priorities for Commission attention. Other concerns might be implemented without the need for more regulation, but rather improved Commission procedure, such as undertaking decision making that reflects the final order of the Commission, and publicizing rationales of such decisions, so that judicial oversight is available to clarify the proper application of relevant law. The public would benefit were Commission process to more closely reflect administrative procedures and review customarily applicable in agency actions.

The Mashpee Wampanoag Tribe looks forward to joining with others who have benefitted from Indian Gaming. And it looks forward to benefitting from improved regulation and guidance from the National Indian Gaming Commission.

Respectfully Submitted,

MASHPEE WAMPANOAG TRIBE, in its
capacity as a federally recognized Indian tribe

By: 

Name: Cedric Cromwell

Title: Chairman & President