



POARCH BAND OF CREEK INDIANS

5811 Jack Springs Road • Atmore, Alabama 36502
Tribal Offices: (251) 368-9136 • Administrative Fax: (251) 368-4502
www.poarchcreekindians-nsn.gov

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Lael Echo-Hawk, Counselor to the Chair
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005
Via email: reg.review@NIGC.gov

Dear Commissioners,

On behalf of the Poarch Band of Creek Indians, I thank you for the opportunity to comment on the National Indian Gaming Commission's Notice of Inquiry published in the Federal Register on November 18, 2010. Having reviewed the Notice, we believe that some of the changes contemplated therein will be of great benefit to Indian country while others will not. Our bases for these beliefs are described below.

First, however, I wanted to be sure to note a concern we have with the enormity of the task being undertaken by the Commission. While we applaud the Commission for taking on such an ambitious goal, we fear that in the end, very little could be accomplished unless priorities are set and timelines are adhered to. It is also critical of course that Indian country remain involved in the process to alleviate any surprises down the road.

Second, even where the Commission decides not to act, we believe that it is important that a record be left detailing the reasons for such inaction. Doing so will benefit the industry greatly as future Commissioners take office and assess their own priorities.

We also see value in the Commission using a combination of both Tribal Advisory Committees and notice and comment rulemaking. We respectfully provide our suggestions below as to how both can be used by the Commission in tandem to achieve its goals. And finally, while our comments track the order in which the questions were raised in the Notice, they do not track what we feel to be their importance. Instead, we address their importance in the body of the text. We hope you find our comments helpful and we look forward to working with the Commission in achieving its ambitious goals.

Part 502 – Definitions

Tribal Position: Disagree

Priority: Not Applicable

Process: Not Applicable

In general, the definitions contained within Part 502 of the Commission's regulations should be consistent with the Indian Gaming Regulatory Act ("IGRA"). While we understand that sometimes clarification is needed, to veer too far from the intent and directives of IGRA is to reach beyond the Commission's authority. We urge the Commission to avoid fixing something that is not broken in an effort to placate a mere handful of commenters. Unless a majority of tribes have expressed concern it seems likely that action is not warranted.

Net Revenues – Allowable Uses

PCI Tribal Position: Disagree

PCI Priority: Not Applicable

The question raised here with regard to adding a definition that would require tribes to consider cash flow before allocating gaming revenues for non-gaming purposes is a prime example of trying to fix something that is not broken. Decisions regarding the expenditure of tribal revenue lie at the very heart of tribal sovereignty and – right or wrong – tribes should be the ones making these decisions. Consequently, we strongly discourage the Commission from adding such a definition.

IGRA is clear in the ways in which tribes can spend gaming revenues. And so long as the contemplated use falls within one of these five permitted categories, the expenditure is appropriate. This decision should not be second-guessed by the Commission. And I would venture to guess that most if not all tribes already consider cash flow before making such allocations. I know we do. We take these types of decisions very seriously. After all, this is our future. . . the future of our members, and of our children. The Commission should not undermine tribal sovereignty by limiting tribal governmental discretion beyond the limitations explicitly imposed by Congress.

Management Contract

PCI Tribal Position: Disagree

PCI Priority: Not Applicable

The Notice of Inquiry also asks whether the definition of management contract should be expanded to include "any contract, such as slot lease agreements, that pays a fee based on a percentage of gaming revenues." We strongly discourage the Commission from making such a change. Just because payment to a third party is based on a percentage of revenue does not mean that the contract involves management. In our experience, these contracts have nothing to do with management. And thus to mandate their submission would be to expand the authority of the Commission beyond what was intended by IGRA. While we appreciate that the Commission will review these types of agreements at the request of tribes, we do not think that their submission or review should be mandated.

Part 514 – Fees – Late Payment System

PCI Tribal Position: Agree

PCI Priority: Low

Process: Notice and Comment Rulemaking

We strongly encourage the Commission to implement a late payment system in lieu of the existing NOV system. As stated in the Notice of Inquiry, the current system is inflexible and often unfair – particularly in cases where payments are late by only a few days. The Commission should consider implementing a system that provides forgiveness in cases where payments are late by only a few days. And while certain egregious situations should be subject to some sort of enforcement action by the Commission, the issuance of an NOV should be done only as a last resort.

Part 518 – Self-Regulation of Class II

PCI Tribal Position: Agree

PCI Priority: High

Process: Tribal Advisory Committee

The idea of revamping the Commission's regulations on self-regulation is of great interest to the Tribe. If done properly, we think this action alone could alleviate a lot of the pressures experienced by the Commission on a daily basis. If the regulations were more practical, more tribes would take advantage of this program, and even more of the daily regulatory responsibilities could shift to the tribes. Notably, self-regulation is exactly what Congress envisioned when it enacted IGRA.

A primary concern that we have with the existing regulation is that it is overly burdensome, but at the same time, lacking in specificity. Given the subjective nature of the criteria, we found it difficult to determine whether we would qualify for self-regulation. Without a better sense of the ultimate outcome, it hardly seems worth putting forth the effort that would be needed to apply and be evaluated. Accordingly, we strongly encourage the Commission to form a Tribal Advisory Committee to rewrite Part 518. This action item should be a priority and we look forward to working with the Commission to craft this regulation into something that will more closely model what Congress intended when it enacted IGRA.

Part 523 – Review and Approval of Existing Ordinances or Resolutions

PCI Tribal Position: Agree

PCI Priority: Medium

Process: Notice and Comment Rulemaking

We understand that there are no tribes whose gaming ordinances justify keeping Part 523 in place. If this is correct, then we agree with the Commission that it can be eliminated. We also believe that this change can be made through notice and comment rulemaking in the Federal Register.

Part 531 – Collateral Agreements

PCI Tribal Position: Disagree

PCI Priority: Not Applicable

Process: Not Applicable

The Notice of Inquiry asks whether the Commission should consider its authority to approve agreements that are collateral to a management contract. While we appreciate that some tribes may voluntarily submit certain agreements to ensure that they do not violate IGRA, we do not think that their submission should be mandatory unless already mandated by IGRA. And because the Commission is currently equipped to handle voluntary requests, we do not think this is a topic on which the Commission should spend any of its limited time.

Part 556 – Background Investigations for Licensing (“Pilot Program”)

PCI Tribal Position: Agree

PCI Priority: Medium

Process: Notice and Comment Rulemaking

The Notice of Inquiry asks whether the background investigation “pilot program” should be formalized in the Commission’s regulations. It is our understanding that more tribes make use of the pilot program than not. And it has been our experience that the process used by the pilot program is much less burdensome and time consuming than the process currently outlined in the Commission’s regulations. We therefore agree that the pilot program should be incorporated into the Commission’s regulations and also be considered as a replacement to the current regulations as opposed to an alternative.

And we also think that when tackling Part 556, the Commission should consider lessening the required information in Part 558, which outlines information that must be collected during the licensing process. Many tribes collect information that over the years has grown to be pointless due to outside investigative sources and internet technology. The collection of such information is time consuming and overly burdensome to the gaming applicant and the staff assigned to review the required information. Finally, we feel that these changes can be made through notice and comment rulemaking rather than through use of a Tribal Advisory Committee.

Part 556 – Fingerprinting for Non-Primary Management Officials or Key Employees

Tribal Position: Agree

Priority: Medium

Process: Notice and Comment Rulemaking

The Commission also asked whether it should adopt regulations that would allow tribes to submit fingerprint cards for non-primary management officials or key employees. We agree that this is a good idea, primarily because we believe that permitting tribes to submit fingerprints for all individuals, including vendors and contract employees, who have access to gaming operations would better enable tribes to protect the integrity of their gaming operations. Still, we think that reporting requirements here should be kept to a minimum. We would not want the lengthy reporting requirements associated with the current submission requirements of fingerprint cards to accompany this ability. In making this change, we think the Commission can utilize notice and comment rulemaking in the Federal Register rather than a Tribal Advisory Committee.

General Comment on Class II MICS and Technical Standards

Tribal Position: Agree

Priority: High

Process: Tribal Advisory Committee

As you know, the Poarch Band of Creek Indians operates three class II facilities in the State of Alabama. Changes in the area of class II gaming are therefore very important to us. We note in particular that the Notice of Inquiry discusses the changes that are underway with regard to the class II MICS and Technical Standards.

We agree with the position that is being forwarded by the National Indian Gaming Association (“NIGA”) that simply taking the existing class III MICS and incorporating them by reference into Section 543 as the class II MICS was not the best idea. The differences between class II and class III gaming are simply too great for this to work. As such, the Commission should revisit Part 543 to ensure that: the regulations are consistent with IGRA; that they reflect the differences between the classes of gaming and types of games listed in IGRA; and to address other concerns that have been and will be raised by tribes and tribal regulators once they are fully consulted.

Along with PCI Tribal Regulators Daniel McGhee and Linda McGhee, I have been very involved in the Tribal Gaming Working Group’s review of the MICS and Technical Standards. Tribal regulators, vendors, and other industry experts from all over the country have been participating in these meetings in an effort to develop a revised set of regulations that are better suited to class II gaming. We truly hope that the work product of this group will be given great deference as the Commission considers how it will ultimately revise its regulations. And hopefully this group’s work product can serve as the starting point of a Tribal Advisory Committee that then works to craft final regulations.

Our work with this group has resulted in a consolidated effort to further minimize the current MICS to truly outline only regulations, while deleting a lot of the standards that we feel are procedural in nature and have no place in a regulation. In conjunction with these deletions, we strongly encourage the Commission to make such procedures available to Tribes as samples, advisory bulletins, etc. Some Tribes, as we did in our early years of regulation, relied heavily on such details in the MICS as a basis for regulation. However, the same result could have been gained if such details had been available as sample procedures recommended by the Commission.

Also, we would recommend that in assembling a Tribal Advisory Committee to work on this task that the Commission avoid forming a committee that is too large to accomplish this goal in a timely manner. Further, because of the varying sections of the MICS, the possibility of one group being chosen who has proper expertise in all areas of the MICS is unlikely. It may be better to utilize various advisory groups with expertise in each section or break down a large group into smaller committees. It has been our experience that large groups tend to bog issues down and not necessarily lend themselves to everyone’s voice being heard with equal regard. The same can be done for the Technical Standards.

In specific response to questions raised concerning Tribal Advisory Committees, we make the following comments:

New: Tribal Advisory Committee (TAC)

Tribal Position: Agree

Priority: High

Process: Tribal Advisory Committee

1. When should a Tribal Advisory Committee (TAC) be formed?
 - a. We believe a TAC should only be formed when requested by Tribes and/or when the Commission needs comprehensive advice on a given topic. However, when a topic reaches across many different areas of specialization, committees should be formed with the flexibility to have subgroups of individuals who specialize in the topics to be discussed.
2. Should a regulation be adopted or a policy statement made?
 - a. We believe a Policy statement along with plans for complying or exempting from FACA would best suit this purpose.
3. Is financial cost a relevant factor in determining whether or not to form a TAC?
 - a. We think at all times financial costs to both NIGC and Tribes should be considered, but never when such determinations harm or prevent important regulation.

New – Communication Policy

Tribal Position: Agree

Priority: Medium

Process: Notice and Comment Rulemaking

The Commission asked whether a policy or regulation should be developed identifying when and how the NIGC communicates with Tribes. We agree that it should and provide the following comments:

1. Should there be a regulation that sets a process for determining how and with whom the NIGC communicates at a Tribe?
 - a. Yes, after appropriate consultation with Tribes, the NIGC should use policy statements and bulletins to outline the process and structure for communication from and to the Tribes. It is likely that there will not be a one fits all answer. Tribes and Tribal governance process are varied based on culture and practical considerations. The NIGC must be prepared to adapt to Tribes not vice versa
2. What types of communication, and what protocols should be included?
 - a. Decide after consultation with the Tribes
3. If so, what process should be used?
 - a. Decide after consultation with the Tribes

New – Buy Indian Act

Tribal Position: Disagree

Priority: N/A

Process: N/A

The Notice of Inquiry asks whether the Commission should adopt a “Buy Indian” regulation consistent with 25 U.S.C. 47. While we believe that the concept behind this suggestion is well-

intended and beneficial, we do not believe it is the responsibility of the Commission to enforce or act outside what was authorized by IGRA. As such, we do not think that the Commission should take this action.

I again thank you on behalf of the Poarch Band of Creek Indians for the opportunity to provide comment on the proposed regulatory changes within the Commission's Notice of Inquiry. We again applaud the Commission for taking-on such an ambitious goal and look forward to working with you and the rest of Indian country as you set priorities and move forward. We especially look forward to working with you in the areas of class II gaming and self-regulation.

Sincerely,



Stephanie Bryan

Vice-Chair

Poarch Band of Creek Indians