



Ponca Tribal Gaming Board

20 White Eagle Drive ♦ ♦ (580) 765-2977 ♦ ♦ Ponca City, Oklahoma 74601

November 29, 2004

Honorable Phillip Hogen, Chairman, National Indian Gaming Commission
and NIGC Technical Standards Advisory Committee Members
National Indian Gaming Commission
1441 L. Street, NW
Washington, D.C. 20005

RE: Ponca Tribe of Oklahoma Comments and Concerns Regarding the Third Draft for
Class II Gaming Technical Standards.

Honorable Chairman Hogen

The Ponca Tribe of Oklahoma appreciates the opportunity to make comments and express our concerns regarding the NIGC's ("Commission") proposal to impose new regulations on Class II Indian gaming. The Commission efforts in developing regulations that will establish technical standards and procedures for the classification and approval of electronic, computer and other technologic Class II gaming machines and aids utilized in Indian gaming operations ("Draft Standards") significantly impacts our self-government and economic development interests. Because the Commission has moved so quickly we have not had a meaningful opportunity to provide detailed comments regarding the proposed draft Classification Standards and Technical definitions.

The Ponca Tribe has interests in operating a safe and regulated gaming environment that has the opportunity to generate significant revenue for our government services and programs. Rather, the Ponca Tribe is interested in engaging in Class II electronic gaming as provided by the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et. seq. ("IGRA"). The dramatic technologic innovations in Class II electronic aids permitted by the IGRA have been the single greatest engine for economic development and self-sufficiency of Tribes since the passage of the Indian Self-Determination Act, 25 U.S.C. §450 et seq., some three decades ago. Please do not take away technologic innovations from the Tribes!

At this time the Ponca Tribe is not interested in compacting with the State of Oklahoma for certain electronic games and providing significant percentages of the Ponca Tribe's adjusted gross revenue to the State. However, the Ponca Tribe may enter negotiations provided the State engage in more meaningful Class III compact negotiations with a small tribe that has a marginally profitable small gaming operation. The recent approval of State Question 712 by the voters of Oklahoma could create problems and conflicts with Class II Standards and game classifications determined at the State level.

Hopefully, any game classifications by the NIGC would supercede what the State of Oklahoma determines to be Class III compact games, if the games meet NIGC Class II standards. Any game classification conflicts in the State of Oklahoma would cause National implications regarding Class II in Indian Country. The small tribes in Oklahoma will bear a much larger burden in the compact and Class II Indian Gaming industry. A major problem exists since tribes are not required to have tribal-state compacts for Class II and it would benefit the State and not the tribes if games currently available to tribes were suddenly determined to be Class III and subject to state fees and oversight. The tribes should be allowed to maintain as many Class II games as determined by Class II standards favorable to tribes and the games currently available and compatible with technological advances meeting Class II final standards.

The Commission's heavy-handed imposition of standards that do not comport with IGRA run counter to the stated policy of IGRA: "promoting tribal economic development, self-sufficiency, and strong tribal governments." See 25 U.S.C. §2701(4). Instead, the new definitions hurt our economic development efforts, hinder governmental self-sufficiency, and weaken our tribe's government by restricting the use of many lucrative Class II gaming devices we currently utilize. The proposed definitions will have a significant impact on our ability to generate revenue for essential governmental services.

We believe that the latest draft of proposed regulations far exceed the text of IGRA and Congress' intent to (i) encourage economic development in Indian Country and (ii) allow for future technologic advances in Indian Gaming. In short, the proposed Draft Technical Standards create new legal and technical definitions that are not found in IGRA and stifle permitted innovation.

The draft regulations (i) disregard the statutory definition of bingo and the common understanding of bingo as played in Indian Country, (ii) ignore established legal precedent recognizing technology and aids as being lawful Class II play, and (iii) expand the Commission's role into an improper legislative role that is reserved for Congress or tribes themselves. The Commission's statutory role is one of monitoring and regulating Indian Gaming, not rewriting IGRA. The underlying IGRA policy for the role of the Commission is to "protect such gaming as a means of generating tribal revenue", not restricting it.

We are cognizant of the Commission's need to demarcate meaningful distinctions between Class II and Class III games. However, arbitrarily imposing new standards that go beyond IGRA retard technologic innovations and hurt class II tribal gaming economies. Such an outcome is clearly at odds with the policy of IGRA and the Commission's stated responsibility.

Particularly alarming to us is the apparent usurpation of our primary gaming regulatory function under IGRA. The impact of such restrictive legal and technical definitions could cripple the use of existing and contemplated technologic improvements that have been sanctioned by Courts, tribes and current and prior NIGC guidelines.

The Commission's efforts to usurp Congress' designation under IGRA that tribes shall have primary regulatory powers over Class II gaming causes us great concern. As a matter of Federal Policy Congress found that:

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

IGRA recognizes tribes and Indian Nations as the primary regulators of Class II gaming. The Commission's long-standing policy carries out this recognition of primary tribal regulatory responsibility. Tribes have a recognized right to engage in, and regulate in the first instance, Class II gaming under the IGRA.

We hope that you will reconsider the direction and speed with which you seek to create new regulations. The draft regulations digress from the Commission's June 2002 regulations and established case law, particularly appellate court holdings showing a steady judicial interpretation sanctioning electronic aids as being within the scope of permitted IGRA Class II play. The draft regulations take many steps backwards. Finally, there undoubtedly will be conflicts with the State of Oklahoma's allowable games that could eliminate Class II electronic games and other games available to tribes as Class II gaming. The small tribes in Oklahoma will be severely affected by the State of Oklahoma's model compact and fee structure.

Respectfully,


Dwight Buffalo Head, Ponca Tribal Chairman


Walter I. Hare, Jr. Ponca Tribal Gaming Board Chairman

cc: Ponca Tribal Business Committee
Ponca Tribal Gaming Board
file