Sac and Fox Nation
Route 2, Box 246 Stroud, OK 74079

Principal Chief KAY RHOADS
Second Chief DARRELL L. GRAY
Secretary GEORGE THURMAN
Treasurer TRUMAN CARTER
Committee Member AUSTIN GRANT

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VIA TELEFAX (202) 632-7066) & OVERNIGHT MAIL

Philip Hogen, Chairman, National Indian Gaming Commission
and Technical Standards Advisory Committee Members
National Indian Gaming Commission
1441 L Street N.W.
Suite 9100
Washington, D.C., 20005

RE: Sac & Fox Nation's Comments and Concerns Regarding Third Draft Technical Standards

Dear Chairman Hogen and Tribal Advisory Committee Members:

The Sac and Fox Nation ("Nation") appreciates the opportunity to make comments and express our concerns regarding the National Indian Gaming Commission's ("NIGC" or "Commission") proposal to impose new regulations on Class II Indian gaming. The Commission's efforts to developing a regulation 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 and because we are a relatively new gaming Tribe, we have not had a meaningful opportunity to provide detailed comments regarding the proposed Technical definitions and classification standards.

The Nation has interests in operating a safe and regulated gaming environment that generates significant revenue for our government services and programs. The Nation 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 Tribes!

At this time the Nation is not interested in compacting with the State of Oklahoma for certain electronic games and providing significant percentages of the Nation's gross revenue to the State. Should the State, however, engage in more meaningful Class III compact negotiations, the Nation might be interested in entering into a Class III compact with Oklahoma. The current situation with Oklahoma makes maintaining lawful Class II electronic gaming even more vital to the Nation. We therefore take issue with the Commission's efforts as jeopardizing meaningful economic development rather protecting lawful gaming under the IGRA.

The Commission's imposition of standards that do not comport with the IGRA run counter to the stated policy of the 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 Nation'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 is clearly inconsistent with the text of the IGRA and Congress' intent to i) encourage economic development in Indian country and ii) allow for future technologic advances in Indian gaming.[1] In short, the proposed Draft Technical Standards create new legal and technical definitions that are not found in the IGRA and stifle permitted innovation.[2]

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[1] See 25 U.S.C. § 2701(4) "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government;" and § 2702, "The purpose of this chapter is-- (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;".

[2] See e.g. *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096 (9th Cir. 2000)(" . . . IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for class II bingo . . . We decline the invitation to impose restrictions on its meaning

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 NIGC's statutory role is one of monitoring and regulating Indian gaming, not rewriting the IGRA. The underlying IGRA policy for the role of the Commission is to "protect such gaming as a means of generating tribal revenue",[3] not to restrict it.

We are cognizant of the NIGC's need to demarcate meaningful distinctions between Class II and Class III games. However, arbitrarily imposing new standards that go beyond the 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 the IGRA. The impact 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 the 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.[4]

The IGRA recognizes tribes and Indian nations as the primary regulators of

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besides those Congress explicitly set forth in the statute.")(emphasis original).

[3] 25 U.S.C. § 2702 (3).

[4] 25 U.S.C. § 2701 (5).

Class II gaming. The Commission's long standing policy carries out this recognition of primary tribal regulatory responsibility.[5] Tribes have a recognized right to engage in, and regulate in the first instance Class II gaming under the IGRA.

We have asked a number of gaming manufacturers that provide Class II electronic bingo and pull tab games to provide you with more technical comments, as we do not currently have resources to offer exhaustive technical and engineering comments and criticisms to your Draft Regulations.

Again, we are very concerned with the short timeframe within which we can propound recommendations and offer comments, and we have not had an adequate chance to provide comments. The comment period is too short. The Draft Regulations are not merely "technical standards" but are rewriting of legal standards. We remain concerned about the process used to promulgate these regulations. We believe that the way the Commission has set up the Technical Standards Advisory Committee means that tribes are left out of meaningful consultation. This jeopardizes the government-to-government relationship Indian tribes have with the United States.

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.[6] The draft regulations take many steps backwards.

The draft regulations appear to outlaw existing and contemplated Class II game features. Not only do the draft regulations appear to freeze technologic development of class II games, the regulations go further to "roll back" technologic innovations. No provision of the IGRA prevents a game of bingo from using a technologic feature to assist a player in daubing. See 25 U.S.C. §2703 (7)(A)(i). The three elements remain the

[5] "Functions of a Tribal Gaming Commission", April 20, 1993, NIGC Bulletin No. 94-3. The Commission wrote: "The NIGC believes that tribal gaming commissions are an appropriate type of governmental agency that can implement the regulatory responsibilities of the tribes under the IGRA."

[6] See, e.g., *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); *Seneca-Cayuga Tribe of Okla. v. Nat. Indian Gaming Comm'n*, 327 F.3d 1019 (10th Cir. 2003), cert. denied, March 1, 2004.

sole criteria for bingo under the IGRA.[7]

While the United States Department of Justice ("DOJ") may still cling to the fallacy that the Johnson Act[8] applies to technologic aids to class II games, such a position has been vanquished nearly universally and on a routine basis for a decade in federal courts across the country.[9] Most recently, the United States Court of Appeals for the Tenth Circuit held that IGRA class II games are insulated from Johnson Act application.[10]

We understand that the Commission's desire to promulgate new regulations may be the result of DOJ consultations and the DOJ's continuing concerns that IGRA class II gaming is "too fast" and "too lucrative" and therefore is too much like slot machine or Class III play.[11] Such distinctions and concerns go well beyond the classifications sanctioned in the IGRA. Such concerns run exactly counter to Congress' stated intent of IGRA, which is to provide economic development to Indian country and to regulate gaming.

So far there has been little evidence of organized crime or corrupting

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[7] Bingo is a game played for prizes when similar objects are drawn or electronically determined, and the game continues to be won by the first person who covers a designated pattern on their card. 25 U.S.C. § 2703 (7)(A)(i).

[8] 15 U.S.C. § 1171 et. seq.

[9] The Commission in its preamble to 2002 NIGC rulemaking recounted the absurdity of the Johnson Act potentially applying to numerous class II technologic aids including "bingo blowers." 67 Fed. Reg. 41166-71 (June 17, 2002).

[10] *Seneca-Cayuga Tribe of Okla. v. NIGC*, 327 F.3d 1019 (10th Cir. 2003), cert. denied, March 1, 2004.

[11] Letter from the DOJ to Congress, June 15, 2002, William E. Moschella, Office of the Assistant Attorney General to Senator Ben Nighthorse Campbell, Chairman of the Senate Committee on Indian Affairs commenting on S. 1529 that would amend IGRA. Mr. Moschella specifically criticized § 2(a) which would clarify that the Johnson Act does not apply to IGRA Class II games. He wrote at page 2:

> The Department believes that this amendment may well result in more lucrative Class II gaming with the use of high speed machines that are virtually indistinguishable to a player from machines in Class III gaming.

(emphasis added)

influences in Indian gaming. Tribes, with the help of the Commission, have done an excellent job of self-regulating gaming and protecting against criminal elements. The Sac and Fox Nation is no exception. We have established a well-functioning Gaming Commission that has effectively regulated our young gaming operations.

The Johnson Act should not be criteria for classifying Class II games. As one court has written:

> Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a class II game and is played with the use of an electronic aid.[12]

The Commission should resist attempts to reinsert the Johnson Act in determining a game's classification. The Johnson Act has no role to play in classifying IGRA Class II games. As the Commission has previously written in its preamble to the June 2002 rule making:

> From the Commission's perspective, the Johnson Act has proven remarkably troublesome as a starting point in a game classification analysis under the IGRA.[13]

We appreciate the opportunity to make these comments and further engage in our government-to-government relationship. We look forward to further dialogue with the Commission and tribal government regulators regarding these issues.

Sincerely yours,

Kay Rhoads
Principal Chief
Sac and Fox Nation

[12] *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 715 (10th Cir. 2000).

[13] 67 Fed. Reg. 41166, 41170.