OFFICE OF THE GOVERNOR
The Chickasaw Nation
Post Office Box 1548 • Ada, Oklahoma 74821
(580) 436-2603 • Fax (580) 436-4287
http://www.chickasaw.net/~cnation

BILL ANOATUBBY
GOVERNOR

November 23, 2004

Mr. Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, DC 20005

Dear Chairman Hogen:

Please accept our comments about proposed class II regulations. We appreciate the National Indian Gaming Commission's publication of policy and regulations this year which endorse government-to-government communication and even deference to Indian nation positions. We also appreciate President Bush for his recent endorsement of government-to-government policy when Indian nations and tribal interests are considered. In addition to these comments, more specific comments will be provided on behalf of the Chickasaw Nation by our gaming commissioner, Mr. Tracy Burris.

We believe that neither this letter nor prior meetings and communications between us and NIGC should be considered as official government-to-government consultation concerning the proposed regulations. In order for that to occur, the Chickasaw Nation contends that presidential and commission policy require special meetings involving Chickasaw legal staff addressing only the proposed regulations.

General

It was an honor for me to have had personal input into the original IGRA language. There is no doubt that Congress intended the tribal governments to have maximum flexibility in the play of Class II gaming when it passed IGRA. The *Congressional Record* language clearly states that "...any inference that tribes should restrict Class II games to existing game sizes, levels of participation, or current technology. . ." was rejected. See Senate Report 100-466, 100th Congress, 2nd Session. The current game classification proposals being considered by the commission digress from the well stated intent of Congress at IGRA's passage. Generally, it appears that the commission is attempting to place more stringent standards on Class II gaming by proposing limited and narrow definitions which have no basis in law and confuse marketing and management rules with game rules. Further, such proposed standards ignore pre-1988 precedent and other long standing precedent relating to post-IGRA class II play.

We are confused by reported statements of the commission legal staff that the proposed regulations do not apply to "paper" bingo. In our reading and discussions of IGRA at passage, bingo remains the same game with or without technical aids.

IGRA Language

In 1988, Congress, at 25 U.S.C. §2701(5) specifically found that Indian nations and Indian tribes "...have the exclusive right to regulate gaming..." Current proposals of the commission are an incursion on that tribal right. The commission, with its latest proposal, goes far beyond its authority to monitor Class II gaming set forth in 25 U.S.C. §2706(b).

Congress established the federal standards for Class II gaming at 25 U.S.C. §2702(7) (A) wherein only three (3) requirements were required for the game of bingo. Court rulings have held that those three (3) standards of Congress "...constitute the sole legal requirements..." for a game to be considered as Class II bingo. The proposed regulations clearly add new requirements to the bingo definition which violate both pre-IGRA play examples, post-IGRA common practice for Class II play and invade not only the regulatory authority of Indian nations and tribes, but also invade tribal discretion in marketing and management decision making.

The proposed regulations make the commission the primary contact for laboratory certification and other vendor contacts. This is another example of the proposed regulations being at odds with the Indian nations as the primary regulators. Contact with non-tribal entities in regard to gaming regulation should remain with Indian nations and tribes as a governmental responsibility of the primary regulator. Another example is Part 9 of the proposed regulations which would establish the commission as the sole authority to certify independent gaming laboratories. By so doing, the commission removes another regulatory role of the tribes. This is contrary to congressional intent to preserve the sovereign rights of tribal governments by designating them as the primary regulators.

The commission's role in having any contact with third parties such as independent laboratories and vendors cannot be justified in IGRA language directing the commission to monitor Class II gaming. In at least one federal court case in Oklahoma, the lack of standing in IGRA for any vendor to have a relationship with the commission was successfully asserted by the commission. It now appears that in this proposed set of standards, the commission ignores IGRA's plain language and its previously asserted court positions.

Lack of Consultation

As stated, the commission's regulations of June 2004 require meaningful consultation before proposed regulations are imposed upon Indian nations and Indian tribes. General communications with the Chickasaw Nation made to date are not considered official consultations concerning these particular proposed regulations. Such specialized communications and consultations remain to be scheduled. We have great concern that the current rule-making process of the commission lacks meaningful Indian input. We are aware that the commission has assembled an "Indian committee" to participate in the rule-making process; however, both the "Indian committee" makeup and the

"Indian committee" input in drafting appear minimal. We adopt the position of Chief Gregory E. Pyle of the Choctaw Nation, made in his August 16, 2004, letter to the chairman of the commission. The "Indian committee" formed by the commission for assistance in the creation of these proposed regulations "...differs significantly from Advisory Committee..." used by the commission and other federal authorities in any federal rule-making with which the Chickasaw Nation is familiar. We believe the "Indian committee" lacks the opportunity and ability to participate meaningfully in the rule-making process.

First, few of the commission-selected "Indian committee" members are Indian. None are known to be elected Indian officials. While the intent to benefit Indian nations and Indian tribes is not called into question by the "Indian committee" makeup, the perspective of the "Indian committee" may be questioned. Moreover, because a majority of the "Indian committee" members are from jurisdictions which have little interest in Class II gaming, the perspective of the "Indian committee" members is once again questionable. Second, the "Indian committee" has not been invited to participate in drafting the proposed regulations. Comparisons of reported "Indian committee" oral comments and the draft appear to demonstrate little, if any, actual input from the "Indian committee." It has been said that written comments made by official Indian government representatives are not shared with the "Indian committee." This lack of input and shared communication impeaches the validity of the rule making process.

We are also troubled by what appears to be a denial of legal counsel to "Indian committee" members. The proposed regulations focus heavily on legal rather than technical issues; yet, reports abound that the "Indian committee," made up of non-lawyers by commission selection, has been denied involvement of numerous legal counsel that such "Indian committee" members have brought to the meetings at Indian expense. This gives the appearance that commission lawyers desire to dictate to the "Indian committee" without the risk of a well reasoned legal response from informed "Indian committee" members. This is not government-to-government consultation.

The meetings of the commission with the "Indian committee" have brought little or no credibility to the process of creating proposed regulations. This has damaged the process in Indian Country. To remedy this perception and assure the commission's adherence with federal consultation policy, a series of direct consultations concerning only the proposed regulations should be conducted with not only the Chickasaw Nation but with every Indian nation and Indian tribe which seeks input. The first meetings should address the scope of the current effort and the technical resource to be made available to Indian governments. See Commission Consultation Policy, March 26, 2004.

Summary

Again, thank you for the opportunity to comment. We appreciate that the commission and the administration of President Bush have adopted formal positions to maintain the government-to-government relationship which exists between the federal government and Indian nations and tribes. As the commission considers how best to evaluate the position of Indian governments with regard to the proposed game standard regulations, We ask that the commission be mindful of the primary role of Indian government in Indian gaming. The Chickasaw Nation formally requests a prominent

role in the process should these proposed regulations continue to be advanced and that meaningful government-to-government consultation concerning these proposed regulations be held between the Indian governments and the commission.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation