March 21, 2001

Mr. John J. Gruttadaurio, Esq.
1414 South Green Road, Suite 101
South Euclid, Ohio 44121

Re: Class II gaming machine classification

Dear Mr. Gruttadaurio:

In your letter of March 1, 2001, you describe a gaming device now in development by a client and request our review and discussion. We understand that the development effort is intended to produce a class II gaming device that, at its core, facilitates the sale of pull-tabs but uses a computer storage medium to house the pull-tabs before sale. The product development would attempt to build from the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Diamond Game Enterprises v. Reno*, 230 F.3d 365, which found a gaming device known as Lucky Tab II to be class II, as that term is defined in the Indian Gaming Regulatory Act.

As you recognize, we are not in a position to offer an advisory opinion on the game until we could examine, at a minimum, a detailed description of the game, its rules of play, and a prototype. We also may need to analyze software code. As you may also know, the Commission has under consideration a proposed rule that would formalize its game classification process. Please understand that it is not the Commission's policy to assist directly in product development. Any observations offered in response to your letter should not be taken in any way as suggesting that the Chairman or the Commission would classify a game in a particular way under the process set forth in the draft regulation or that an advisory opinion from the Commission's general counsel would consider the game in a particular manner after evaluation of a prototype under the current classification process. With these caveats, I respond to your letter and offer some observations about the issues you raise.

We read the *Diamond Game* opinion as standing for the proposition that a device may be considered lawful and permissible in the play of a class II game when the device by electronic means reads the contents of a paper pull-tab and then displays on a video monitor the contents of that pull-tab as that pull-tab is dispensed to a player. In that sense, the device can serve as a technological aid to the play of the paper pull-tab game.

In the Lucky Tab II game, a player could obtain the pull-tabs from a clerk and not use the device or the player could obtain the pull-tab from the device without regard to

the electronic display. The court concluded, essentially, that the player was playing the paper pull-tab game. It is far from certain that same conclusion could be reached in your game. As we understand your client's product design, a distinguishing feature compared to the Lucky Tab II machine at issue in *Diamond Game* is that the paper pull-tabs are not otherwise available until the player engages the machine and the player must always engage the machine. As such, game play may not be "readily distinguishable from the play of a game of chance on an electronic...facsimile," to quote from the Commission's definition of technological aid at 25 C.F.R. § 502.7.

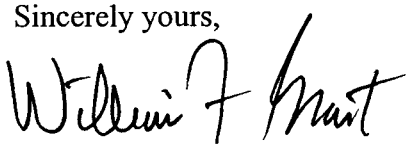
The timing of the printing and the display of a pull-tab could present another issue. If the display in your machine is that of an electronic facsimile of a pull-tab from the computer storage file and not a display derived from an actual paper pull-tab, then the game appears closer to the device at issue in *Sycuan Band v. Roache*, 54 F. 3d 535 (9th Circuit, 1994), which was found to be class III. An optional feature of producing a paper pull tab after the video display—and we assume the player would do so only if the player had located a winning combination in the deal and needed a ticket to claim a prize—would not seem to bring the new device within the parameters of the *Diamond Game* decision. The Court also noted that, unlike the machine in *Cabazon Band v. NIGC*, 14 F. 3d 633 (D.C. Cir. 1994), the Lucky Tab II did not contain an "internal computer that generates the game." There is a question on whether your client's new gaming device contains such an "internal computer."

We understand from your letter that the sequence of sale from among the pull-tabs on the electronic cartridge would be predetermined before the cartridge was placed in use. The fact that the player was always going to receive the next pull-tab on the roll may have been an important factor to the Court in *Diamond Game*.

Other salient features of the Lucky Tab II--perhaps better phrased as missing features--are its inability to accumulate winning credits and its inability to pay winners. The paper tickets are to be redeemed by a cashier in both Lucky Tab II and, as we understand, in your client's game. We have not considered how changing these features would impact on a game classification or how the Court in *Diamond Game* might have viewed these features.

Thanks for sharing some of your proposed game features with us. While we cannot offer a classification at this time, it is always interesting for us to hear what the industry has in mind.

Sincerely yours,



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