



Office of the Gaming Commissioner

September 8, 2022

Mr. E. Sequoyah Simermeyer, Chairperson
National Indian Gaming Commission
1849 C. Street, NW
Mail Stop #1621
Washington, D.C. 20240

Re: SCOGC's Comments to NIGC's Proposed Rule Amending Appeals By Written Submissions to the Commission

Dear Chairperson Simermeyer and Commission Members:

The Seneca-Cayuga Nation Office of the Gaming Commissioner is pleased to offer these comments regarding the Proposed Rule published by the National Indian Gaming Commission on August 10, 2022, seeking to amend the regulations governing appeals to the Commission under 25 C.F.R. Part 585. We appreciate the NIGC's efforts to solicit tribal input on this important matter prior to promulgating any Final Rule, and hope that the NIGC fully considers all comments made in response to this Proposed Rule.

A handwritten signature in blue ink, appearing to read "Danielle Brashear", written over a horizontal line.

Danielle Brashear, Commissioner
Seneca-Cayuga Office of the Gaming Commissioner

Enclosure.

I. Introduction

These comments are made in response to the Proposed Rule published in the Federal Register on August 10, 2022, by the National Indian Gaming Commission (“NIGC”) related to appeals by written submissions to the NIGC under 25 C.F.R. Part 585. The Seneca-Cayuga Nation Office of the Gaming Commissioner (“SCOGC”) is pleased to provide input on the NIGC’s proposed regulatory changes, and therefore submits the following comments.

II. Comments.

A. Settlement Process - § 585.8

The SCOGC generally supports the proposed addition to 25 C.F.R. Part 585 concerning the procedures for settling matters on appeals before the NIGC. Having a formal procedure established by regulation that tribal governments and the NIGC can follow brings consistency to settlement negotiation process. To this end, we believe that the proposed Section 585.8 is generally even-handed, and increases the likelihood that a tribal government and the Chair will enter into a fair and equitable settlement agreement. However, we still believe that the proposed Section 585.8 should be modified in a couple of minor ways to best ensure a tribal government and the NIGC have the best opportunity to enter into a settlement agreement in a manner that enhances fundamental fairness.

First, we suggest amending the proposed § 585.8 (a) to permit a tribal government – on its own motion – to move to stay the proceedings for a reasonable time to permit the negotiation of a settlement agreement. Currently, the proposed rule requires that the parties “*jointly* move to stay the proceeding” for this purpose. Normally, we expect that there will be no issue and the Chair will be perfectly amenable to stay these proceedings in order to enter into settlement negotiations. However, if this requirement is to be used to the detriment of one of the parties, it could only conceivably be used to disadvantage a tribal government. The NIGC Chair does not face the potential of a civil fine assessment or the temporary closure of a gaming facility should they not prevail on appeal, or otherwise fail to enter into a settlement agreement. But, if the NIGC Chair unilaterally refuses to agree to move to stay proceedings and enter into settlement negotiations, it is the tribal government that misses out on the opportunity of avoiding or mitigating serious and costly penalties. Accordingly, we believe that this proposed regulation should be rewritten to permit not only joint motions to stay proceedings, but motions made solely by the tribal governmental party.

Next, we believe that language should be inserted into this Part that segregates the authorities of the Chair with that of the Commission as a whole. Not only under the proposed rule must the Chair agree and “jointly move” to stay proceedings, but the Chair would also seemingly get to serve as a voting member of the Commission on this joint motion or any other motions raised by an appealing tribal government. In the interests of fundamental fairness and the overall integrity of this process, we believe that provisions should be inserted restricting the Chair from serving as a party to this action while simultaneously serving as its adjudicator.

B. Motion Practice - § 585.4

The SCOGC opposes the NIGC's proposed amendments to its regulations at 25 C.F.R. § 585.4 to the extent that it would restrict the types of motions that may be raised in Part 585 proceedings. Under this regulatory section as currently promulgated, a tribal government is permitted to make any of four specifically enumerated motions, including motions for extension of time, motions to supplement the record, motions to intervene, and motions to reconsider, as well as motions that fall into a "catch-all" category. Presently, Section 585.4 (a) permits a party to make any other motions which will "be considered at the discretion of the Commission." We believe that this "catch-all" provision in this subsection serves a crucial purpose and it permits tribal governments to make motions that may be difficult to foresee or will not be applicable in every proceeding, but are nevertheless reasonable in the context of a specific appeal as the interests of justice demand.

There are a variety of motions that could be raised in the context of a Part 585 appeal that may be necessary to ensure the fundamental fairness of the proceedings that are not expressly listed in the proposed § 585.4. This includes, to name but a few possibilities, motions to recuse, any joint motions that may be agreed to by the parties, motions to exclude evidence, and motions to stay proceedings. Accordingly, we fail to see the advantage in limiting the universe of motions permitted in Part 585 appeals. As a matter of fundamental fairness and due process of law, we believe that the NIGC should keep § 585.4 (a) as currently written because it provides greater flexibility in the Part 585 appeals process and does not handcuff the parties when novel circumstances arise.

The SCOGC also points out that if the Commission is going to move forward with its proposed settlement process in § 585.8, motions to stay proceedings need to be included in the list of permissible motions in § 585.4 (a), although we think the best course of action is to explicitly include motions to stay to this list and keep the general catch-all proviso. As a final point, during the Series B Consultation held between September 13 and November 1, 2021, in which the NIGC discussed potential amendments to Part 585, the idea of limiting what motions are permitted § 585.4 (a) was never introduced by the NIGC. Accordingly, this is the very first time that tribal governments, have notice and the opportunity to comment on this proposal.

We also disagree with the Commission's proposed modification of the provision prohibiting the Chair from *filing* or *responding* to motions in 25 C.F.R. § 585.4 (b). The proposed change here is likely related to the Commission's proposal to have the parties *jointly* move to stay proceedings for the purposes of entering into settlement negotiations, but as addressed above, we think it prudent to segregate the Chair's powers as an adjudicator of an appeal when they are serving as a party to an appeal. Without any requirement that the Chair recuse themselves from the appeal before the Commission as a body, we feel it is inappropriate for the Chair to have the authority to rule, as a member of the larger body, on any motion made by the Chair. Accordingly, we think it increases the fundamental fairness of the Part 585 process if the Chair is prohibited from filing or responding to motions unless they are prohibited from participating in the vote or discussion ultimately leading to the Commission's ruling on such motion. The elimination of the prohibition of the Chair *filing* motions was also not included in the Series B consultation.

Alternatively, we recommend that the Commission withdraw this proposed revision and send the matter of appeals out for further tribal consultation. The NIGC appeals process has proven problematic from the beginning largely due to its small composition. Without a third Commissioner issues of fundamental fairness and due process of law are even more compounded. We believe that this provision would benefit from further consideration.

III. Conclusion

The SCOGC sincerely appreciates the opportunity to provide comments on the NIGC's proposed rule regarding the appeals process set forth in 25 C.F.R. Part 585. The SCOGC further looks forward to continuing to engage in meaningful consultation with the NIGC on these and other matters in the future. We are confident that such collaboration will result in the promulgation of regulations that will benefit the tribal gaming industry.