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September 7, 2022

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

Re: Tribal Comments to the NIGC's Proposed Amendments to 25 C.F.R. Part 585 -
Appeals to the Commission

Dear Chair Simermeyer & Members of the Commission:

Included along with this letter are the Quapaw Nation Gaming Agency's comments on the National Indian Gaming Commission's proposed amendments to its regulations, specifically appeals to the Commission on written submissions, found at 25 C.F.R. Part 585. These comments expand on the comments submitted following the NIGC consultations held on September 21-22, 2021, and October 21, 2021. We sincerely appreciate the NIGC's efforts to solicit and consider tribal input on these matters, which will have a tangible impact on Tribal Gaming Regulatory Agencies' ability to adequately protect the integrity of gaming.

Erin Eckhart, Director
Quapaw Nation Gaming Agency

Enclosure.

COMMENTS OF THE QUAPAW NATION GAMING AGENCY ON THE NATIONAL INDIAN GAMING COMMISSION’S PROPOSED AMENDMENTS TO 25 C.F.R. PART 585.

I. INTRODUCTION

These comments are submitted in response to the proposed rule published in the Federal Register by the National Indian Gaming Commission (NIGC) on August 10, 2022, that if promulgated, would amend the process governing appeals before the Commission on written submissions at 25 C.F.R. Part 585. In response to this proposed rule, the Quapaw Nation Gaming Agency (QNGA) respectfully submits the following comments for consideration.

II. COMMENTS

A. Limiting Motions in Appeals to the Commission [25 C.F.R. § 585.4 (a)]

The QNGA is opposed to the NIGC’s proposed amendment to 25 C.F.R. § 585.4 (a) insofar as this would limit the types of motions that could be raised in Part 585 proceedings. Currently, § 585.4 (a) permits a tribal government to make one of four specifically enumerated motions as well as other motions that are to be “considered at the discretion of the Commission.” The QNGA believes that if the Commission’s proposal were adopted, the Commission would be making an imprudent trade-off: by standardizing the proceedings under this Part, the Commission would be restricting administrative flexibility at the expense of fundamental fairness. Moreover, this revision is likely to create “catch-22” situations, especially where novel issues arise.

Accordingly, we strongly support maintaining the current “catch-all” provision in 25 C.F.R. § 585.4 (a) as we believe this is the best way to account for unprecedented and/or unpredictable situations that may warrant some special action or consideration on the part of the Commission. We also note that the Commission will still retain the discretion to allow a motion that is not enumerated in § 585.4 (a), so there are safeguards in place to limit procedural delay tactics. Keeping the catch-all provision will prevent prejudice to both the Commission and tribal governments and will enhance fundamental fairness and due process of law.

Settlement Negotiations and Procedures [25 C.F.R. § 585.8]

The QNGA does not object to the codification of a settlement negotiation process in 25 C.F.R. Part 585. The establishment of a settlement process in this Part that can be consistently relied on by the parties should be beneficial to all concerned. That said, we believe that § 585.8 (a) should be rewritten in a manner that authorizes a tribal party, solely on its own motion, to move to stay proceedings for a reasonable time to permit the negotiation of a settlement agreement. As currently proposed, the NIGC Chair and the tribal party would have to jointly move to stay proceedings, but we think that this contradicts § 585.4 (b) as currently promulgated. Allowing the Chair to file

motions in Part 585 proceedings only further exacerbates our concerns regarding the Chair's authority as an advocate and adjudicator.

Moreover, mandating that both parties to an appeal must jointly move to stay proceedings, practically speaking, is a requirement that could be used only to the detriment of a tribal government. There are no proposed standards for when a Chair may choose not to enter into negotiations, and the QNGA believes that the Commission should aim to eliminate unnecessary barriers to entering into settlement negotiations. Accordingly, because we see no benefit in having the parties to an appeal jointly agree to stay proceedings to enter into settlement negotiations, we encourage the Commission to adopt a less stringent standard that allows a tribal government to make this motion on its own.

B. The Chair's Role in the Part 585 Process [25 C.F.R. §§ 585.4 (b) and 585.8]

In the interests of creating as fair and equitable of an appeals system as possible, we encourage the Commission to reconsider the powers of the Chair in Part 585. Currently, the Chair not only has the authority to make virtually all appealable final decisions in the first instance, but he then serves as a party to an appeal as well as an adjudicator of the appeal in the second instance, which presents issues of fundamental fairness and due process of law. As such, we encourage the Commission to consider segregating the Chair's authority as a party/advocate and the Chair's authority as an adjudicator over a matter on appeal. If there were these safeguards in place, we would be far less concerned with the Chair's ability to respond or file motions in Part 585 appeals, including agreeing to any joint motions. However, without any requirement that the Chair recuse him or herself from participating in the discussion or vote on motions filed by tribal governments or the ultimate matter to be decided on appeal - while the chair is serving as a party/advocate in these proceedings - we fear that tribal governments will not perceive Part 585 as a truly equitable appeals process.

III. CONCLUSION

The QNGA appreciates the opportunity to provide comments to the NIGC, and we are confident that through cooperative discourse, the NIGC will achieve regulations that foster the integrity of gaming without imposing an undue burden on TGRAs, tribal governments, and tribal gaming operations. Maintaining the perceived and actual fundamental fairness of the Commission's administrative proceedings is of paramount importance to tribal governments and the Commission, and we hope that we can continue working towards those ends. We look forward to continuing to engage in meaningful collaboration with the NIGC in the future.