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VIA e-mail to reg.review@nigc.gov

Tracie Stevens, Chairperson
Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, DC 20005

Re: Comments on "Electronic One Touch Bingo System," 78 Fed. Reg. 37998 (June 25, 2013)

Dear Chairperson Stevens and Commissioner Little:

Below please find comments on behalf of the Port Gamble S'Klallam Tribe ("Tribe") on the National Indian Gaming Commission's ("NIGC" or "Commission") proposal to recognize as Class II "server based electronic bingo system games that can be played utilizing only one touch of a button ('one touch bingo')." 78 Fed. Reg. at 37998. As detailed below, the Tribe strongly supports the NIGC's proposal, which is fully consistent with the text of the Indian Gaming Regulatory Act ("IGRA"), the legislative history, the NIGC's regulations and applicable case law.

The Port Gamble S'Klallam Tribe opened The Point Casino in 2002 which includes a mix of Class II and Class III games. Class II gaming is an important revenue source for the Tribe and the One Touch Bingo System makes play easier for the customers.

The Tribe agrees with the Commission's proposal "to reinterpret the position regarding one touch bingo as set forth in the Metlakatla Ordinance disapproval." 78 Fed. Reg. at 37999. The Metlakatla disapproval was issued in 2008 in response to a tribal ordinance amendment that sought to clarify that:

Class II gaming includes an electronic, computer or other technologic aid to the game of bingo that, as part of an electronically linked bingo system, assists the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player.

Id. This type of auto-daub aid feature often is referred to as "one touch" since, once activated, further action by the player during the game is not required.

The former NIGC Chairman took the position in the Metlakatla ordinance disapproval ("Ordinance Letter") that the use of the aid feature described above would convert a Class II bingo game into a Class III game. The Ordinance Letter included two arguments to support this position: (1) the IGRA requirement that a bingo game must be won by the first person to cover the winning numbers requires competition, which is lacking in a bingo game played with one touch auto-daub; and (2) by "allowing the game system, rather than the player, to 'cover' the bingo card incorporates all characteristics of the game of bingo into an electronic machine and system, and thereby renders one touch bingo a Class III electronic facsimile of a game of chance." 78 Fed. Reg. at 37999.

As detailed below, the Tribe agrees with the Commission that the two arguments expressed in the Ordinance Letter were incorrect as a matter of law. Contrary to the views set forth in that earlier letter, the use of the one touch auto-daub feature in connection with a linked bingo game is consistent with the IGRA's definition of bingo and does not convert a Class II bingo game into a Class III facsimile.

1. The Use of OneTouch Auto-Daub is Consistent with the IGRA Definition of Bingo.

As has been held by the federal courts, the three statutory requirements of bingo set forth in the IGRA are the sole legal requirements for a game to qualify as bingo. *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000). Nevertheless, the Ordinance Letter asserted that the use of one touch auto-daub prevents a game from qualifying as Class II bingo, even if it satisfies the IGRA requirements for bingo in all other respects. According to the Ordinance Letter, the "first person to cover" requirement in the IGRA definition of bingo requires competition between players and that there can be competition in a bingo game only if the players are permitted to "sleep" a bingo by not covering numbers or other designations that are drawn or electronically determined and displayed to the players that would result in a winning pattern. The Tribe agrees with the Commission that the IGRA definition of bingo does not support such a requirement.

In fact, nothing about the phrase "first person to cover" or any other aspect of the IGRA definition of bingo suggests that the ability to sleep a bingo is a required element of the game. Indeed, in determining whether a game satisfied the statutory elements of bingo, the courts have evaluated what it means for a player to "cover" the numbers on a bingo card when electronic covering is used. *U.S. v. 103 Elec. Gambling Devices*, No.

98-1984, 1998 WL 827586, at *6 (N.D. Cal. Nov. 23, 1998), aff'd 223 F.3d 1091 (9th Cir. 2000). In rejecting the argument that MegaMania failed to satisfy the definition of bingo because of its electronic daub feature, the court stated that "[t]here is nothing in IGRA . . . that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately." *Id.* To the contrary, the court emphasized that IGRA "merely require[s] that a player cover the numbers without specifying how they must be covered." *Id.* Thus, the manner in which players cover numbers on their card(s) is irrelevant.

Whether or not one touch auto-daub aid is utilized, the game is still won by the first person to cover the winning bingo pattern based on the sequence of bingo numbers for that game and the other cards in play. The first player is the one who covers the winning bingo pattern in the fewest quantity of bingo numbers drawn/determined for that game. Nothing about the auto-daub feature changes the quantity of bingo numbers necessary to be the first player with the winning bingo pattern. Even with auto-daub the "cover" function is performed during the game's natural progression, only after each release of balls, and thus IGRA's sequencing requirement that the cover take place after the release of bingo numbers continues to be satisfied. Auto-daub cannot operate independent of the player, and it has no impact on the outcome of the game. The statutory requirements of bingo are satisfied so long as numbers are covered when similarly numbered objects are drawn or electronically determined. The one touch auto-daub aid feature merely assists the player with tracking and covering numbers so the player will not miss a win.

Further, the Ordinance Letter was fundamentally wrong that the element of competition in a bingo game is defined by the ability to sleep a bingo. Rather, the competition lies not in the ability to sleep, but in the fact that each player is competing against the other players in the game to be the first to cover a game-winning pattern on his/her bingo card based on the results of a random ball draw or selection of bingo numbers. Whether or not a player wins depends on the cards in play by that player and other players and the unique sequence of bingo numbers drawn/determined for that game. This competition between the players is present whether or not a player is permitted to "sleep" a bingo. As correctly noted by the Commission, "[w]hether a player presses a button one time or two, the player is engaging with the machine, participating in the bingo game, and competing with fellow players on the electronically linked bingo system." 78 Fed. Reg. at 37999.

In other words, the use of the one touch auto-daub feature does nothing to disturb the competition between players. The aid feature can only be used in the context of an actual bingo game where multiple players with unique bingo cards compete and play against a common ball draw. The players play against each other in exactly the same

way as they do in any other bingo game. The only difference is that the aid assists the player with tracking and covering the numbers, much like the agents the NIGC Office of General Counsel has consistently opined are permissible. See, e.g., Nat'l Indian Gaming Comm'n, National Indian Bingo Game Classification Op. (Nov. 14, 2000), available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/bingo/nationalindianbingo111400.pdf>). For this reason, the Tribe agrees with the Commission that "the previous interpretation's requirement that the cover of the bingo card be done manually by the player through an additional pressing of a button is an additional requirement not mandated by the statute." 78 Fed. Reg. at 37999.

The Ordinance Letter suggested that it was based on how the game of bingo was "traditionally" played. However, the IGRA explicitly recognized that the game of bingo it authorized was not limited to the children's paper game, and explicitly authorized the use of technologic aids in connection therewith. Accordingly, it is the statutory definition of bingo and not tradition that controls whether a game meets the definition of Class II bingo. As explained by the Ninth Circuit:

The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole legal requirements for a game to count as class II bingo.

There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

Further, IGRA includes within its definition of bingo "pull-tabs, . . . punch boards, tip jars, [and] instant bingo . . . [if played in the same location as the game commonly known as bingo]," 25 U.S.C. § 2703(7)(A)(i), none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. . . . Instant bingo, for example, is as the Fifth Circuit explained in *Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner*, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. See *id.* at 192-93.

Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C. § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

103 Electronic Gambling Devices, 223 F.3d at 1096. See also 162 MegaMania Gambling Devices, 231 F.3d at 723. ("While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed.").

While Congress was clear that tribal bingo was not limited by traditional notions of the game, it was equally clear that it intended for tribes to have "maximum flexibility" to use "modern" technology to conduct bingo games. S. Rep. No. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079. In this regard, it is relevant that this type of bingo aid feature predates passage of the IGRA in 1988.

It also is relevant that this very same bingo aid feature is widely permitted today by the federal government on U.S. military reservations and in many other non-Indian bingo facilities. The Commission's proposed interpretation is consistent with Congress' intent that tribes have "maximum flexibility" to use such "modern" technology to play bingo games, and in its statutory authorization for tribes to use such aids. As the Commission correctly noted, it "should give consideration to an interpretation of bingo that embraces rather than stifles technological advancements in gaming." 78 Fed. Reg. at 38000.

2. The One Touch Auto-Daub Feature Would Not Transform the Game of Bingo into a Class III Facsimile.

The use of the one touch auto-daub feature does not transform a game from Class II bingo into a Class III facsimile. As explained by the Commission: "the previous interpretation concluded 'as it is applied to bingo, . . . the "except when" language of 502.8 [] require[s] some – even minimal participation in the game by the players above and beyond the mere pressing of a button to begin the game.' We find this interpretation in error because whether a game constitutes bingo or not cannot be reduced to the number of times a button is pushed. Rather, as set out above, we must look to whether the statutory elements of the game are met." 78 Fed. Reg. at 38000. The Commission's position is fully consistent with the statute and regulations.

The IGRA provides that Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance," 25 U.S.C. § 2703(7)(B)(ii), however, the term "facsimile" is not defined by the statute. The Commission has defined facsimile to mean:

Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to

bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8 (emphasis added). Thus, the definition provides that a bingo game can be played in an "electronic or electromechanical format" without becoming a facsimile as long as the format requires the players to play with or against each other rather than with or against a machine.

The Ordinance Letter failed to recognize that a format that requires players to play with or against each other necessarily is one that does not incorporate or replicate all of the features of the bingo game. The most fundamental aspect of the game – players competing against each other with different bingo cards against a common ball draw – is not electronic or automatic. The game is, in fact, a live bingo game that is taking place across a linked network of actual players. This remains the case whether or not auto-daub is used. Stated another way, the fundamental characteristics of the game are preserved, unaltered by the game's electronic format. As explained by the NIGC:

IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a wholly electronic format, provided that multiple players are playing with or against each other. These players may be playing at the same facility or via links to players in other facilities. A manual component to the game is not necessary. What IGRA does not allow with regard to bingo, lotto, and other games similar to bingo, is a wholly electronic version of the game that does not broaden participation, but instead permits a player to play alone with or against a machine rather than with or against other players.

67 Fed. Reg. 41,166, 41,171 (June 17, 2002) (emphasis added).

The NIGC's existing definition of facsimile is consistent with legislative history and case law. The legislative history indicates that Congress did not intend the facsimile prohibition to restrict the use of electronics to play games that meet the IGRA definition of bingo. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and not with or against other players. As explained in the Senate Report:

The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various

reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphases added).

Thus, as now recognized by the Commission, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. § 2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."

The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. See 103 Electronic Gambling Devices, 223 F.3d at 1100; 162 MegaMania Gambling Devices, 231 F.3d at 724. The addition of a one touch auto-daub aid feature does not change the fact that players are competing against each other in a common game.

Thus, no additional participation is required to prevent the game from becoming a facsimile. Instead, the NIGC definition of facsimile correctly recognizes that, regardless of the number of electronic aids used in a bingo game, the game does not become a facsimile if "the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine." 25 C.F.R. § 502.8 (emphasis added). As long as there are players playing against each other, the game is not a facsimile.

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Conclusion

The Tribe is pleased that the Commission has decided to clarify that a game that is otherwise Class II bingo is not converted into a Class III game through the addition of a one touch auto daub feature. Congress provided a bright line test to distinguish electronically-aided Class II games from Class III games. That line is not based on the number of player "touches" required to interact with the game. Rather, Class II bingo includes any game that meets the three statutory requirements set forth by Congress. Such games may be played with any form of electronic, computer or other technologic aid, so long as the aid does not permit a single player to play alone with or against the machine.

Sincerely,

Linda Helm, Executive Director
Port Gamble S'Klallam Tribal Gaming