



Laguna Gaming Control Board

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August 23, 2013

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

Tracie Stevens, Honorable Chairwoman
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, DC 20005

Re: Comments Regarding NIGC Clarification of “Electronic One Touch Class II Bingo System,” 78 Fed. Reg. 37998 (June 25, 2013)

Dear Chairwoman Stevens:

The following comments are submitted on behalf of the Pueblo of Laguna, hereafter “the Pueblo”, regarding the National Indian Gaming Commission’s recent clarification of 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 Pueblo strongly supports the NIGC’s proposed classification, 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 Pueblo agrees with the Commission’s proposal “to reinterpret the position regarding one touch bingo as set forth in the former NIGC Chairman’s 2008 Metlakatla ordinance disapproval letter.” 78 Fed. Reg. at 37999. The Metlakatla disapproval was issued in response to a tribal ordinance amendment that sought to clarify that Class II gaming includes an electronic technologic aid to the game of bingo utilizing an auto-daub feature. This feature is often referred to as “one touch” since, once activated, further action by the player is not required in order to participate in the play of the game.

The former Chairman took the position that the use of the one touch feature described above would convert a Class II bingo game into a Class III game. Through the Metlakatla ordinance disapproval letter, he asserted 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)

“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.

The Pueblo agrees with the opinion now expressed by the current NIGC administration that the two arguments offered in the Metlakatla ordinance disapproval letter were incorrect as a matter of law. Contrary to the views set forth in that 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 One Touch 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). First, it must be played for prizes, including monetary prizes, with cards bearing numbers or other designations. Next, the holder of the card must cover such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined. Finally, the game is won by the first person (or, as acknowledged by the federal courts, persons) covering a previously designated arrangement of numbers or designations on such cards. 25 U.S.C. 2703(7)(A)(i)(I)–(III).

According to the Metlakatla ordinance disapproval letter, the phrase “first person to cover” in the IGRA definition of bingo establishes the requirement of competition between players. Following that theory, there could be competition in a bingo game only if the players are able to miss or “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.

However, 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 one touch 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.*

Accordingly, the argument that the element of competition in a bingo game is defined by the ability to sleep a bingo is contrary to federal court decisions and fundamentally flawed. Rather, the competition in bingo lies not in the ability to sleep, but rather 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 in 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 NIGC, “[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.

Thus, the manner in which players cover numbers on their card(s) is irrelevant. In fact, nothing about the phrase “first person to cover” or any other aspect of the IGRA definition of bingo suggests that manually covering each number or the corresponding ability to sleep a bingo is a required element of the game. The Pueblo agrees with the NIGC that the IGRA definition of bingo does not support such a requirement.

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

The Pueblo agrees with the NIGC that the use of the one touch auto-daub feature does not transform a game from Class II bingo into a Class III facsimile. 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 being a “facsimile” as long as the format requires the players to play with or against each other rather than with or against a machine.

As the NIGC now clarifies:

“[T]he 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 Metlakatla ordinance disapproval 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 bingo into a single 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 among 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.

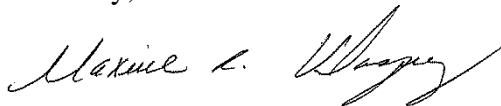
The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station because 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 feature does not change the fact that players are competing against each other in a common game.

Thus, as now belatedly recognized by the Commission, a one touch feature does not transform a Class II electronic bingo game into a Class III facsimile. Instead, the NIGC's proposed reinterpretation accords with its regulatory definition of a facsimile: even if one or more 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. The NIGC's position in this regard is fully consistent with statute and regulations and the Pueblo agrees with Commission's view.

Conclusion

The Pueblo 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. The line between electronically-aided Class II games and Class III facsimiles 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. Furthermore, the Pueblo recognizes Class II electronic gaming as a vitally important source of revenue for Indian Country and as an important component in promoting tribal economic development, self-sufficiency and strong tribal governments.

Sincerely,



Maxine R. Velasquez
Chair
Laguna Gaming Control Board



George H. Pradt
Vice Chair
Laguna Gaming Control Board



Richard Chisoe
Secretary-Treasurer
Laguna Gaming Control Board

cc: The Honorable Richard Luarkie, Governor, Pueblo of Laguna
Tammi Lambert, Esq., Government Affairs Director, Pueblo of Laguna
Mr. Stephen Durkin, Executive Director, Pueblo of Laguna Tribal Gaming Regulatory
Authority