



20 Black Brook Road
Aquinnah MA 02535

Phone: 508-645-9265
Fax: 508-645-3790

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Submitted by email: reg.review@nigc.gov
Submitted by Fax: (202) 632-7066

Honorable Tracie Stevens
National Indian Gaming Commission
Attn: Regulatory Review
1441 L Street NW Suite 9100
Washington, DC, 20005

Re: Comments regarding Part 543 and Part 547 discussion drafts

Dear Chairwoman Stevens:

The Wampanoag Tribe of Gay Head (Aquinnah) strongly supports the process of regulatory review the NIGC has undertaken during the past 12 months. Under your tenure, the NIGC has maintained a level of consistency and transparency previously unheard of by any federal agency, and you should be commended.

Class II gaming is the foundation of Indian gaming. We appreciate the Commission commitment to follow through on the promise to finally publish Class II MICS and Technical Standards. While we may occasionally disagree on substance, we applaud the Commission's commitment to consulting with tribes throughout the development of these regulations. The Wampanoag Tribe of Gay Head (Aquinnah) appreciates the opportunity to comment on the discussion drafts of Class MICS and Technical Standards and looks forward to seeing the publication of proposed rules soon.

GENERAL COMMENTS

First, the Tribe continues to recommend that as you complete your work finalizing the Class II regulations, please keep in mind that a viable Class II game is the only leverage many tribes have in the wake of the *Seminole* decision. We also recommend the NIGC continue its work under the Stevens Administration to work collaboratively with the DOI and DOJ to develop a collective and coordinated approach which will ensure tribes are in the position that Congress intended when states refuse to negotiate in good faith.

Historically, one of the overriding Tribal concerns with the MICS has been former NIGC Administration's prescriptive approach to achieving a regulatory objective. However, in an industry in which technologies and industry practices are constantly changing and evolving, we encourage the NIGC to strive to achieve its regulatory objectives while allowing the industry the flexibility to grow with technology. Because tribal gaming operations are diverse and complex and may differ in available resources, it is important that tribes have flexibility to define their own internal controls and processes based on the particular resources each tribe may, or may not have. We recognize the current Commission's familiarity with this issue and encourage you to continue to refine the MICS to ensure both the Commission's regulatory requirements and tribal concerns are met.

With regard to the Class II MICS and Technical Standards, we recommend that where possible, the definitions included in both remain consistent. Differences in definitions where the subject matter is the same can lead to confusion and misunderstanding.

We also note that Section 543.3(a) of the discussion draft provides that tribal gaming regulatory agencies may establish and implement additional controls. However, later in Section 543.3(h)(2) the discussion draft provides explicit recognition that tribes are the primary regulators of their gaming operations. We believe that it would be appropriate to formalize this Commission's consistent recognition that tribes are, in fact, the primary regulators of Indian gaming. We recommend inserting a statement to that effect in both Part 543 and 547 so that future Commissions are guided by this recognition.

The proposed regulations submitted by the Tribal Gaming Working Group included a significant amount of guidance information. The Wampanoag Tribe of Gay Head (Aquinnah) recommends that the NIGC utilize guidance documents, similar to guidance documents used by other federal agencies, to assist tribes as we begin to revise our MICS to meet these new regulations. Because guidance documents can be revised more easily than regulation, such documents would be invaluable to both the NIGC and tribal gaming operations as they change with changing technology.

TECHNICAL COMMENTS

1. 25 C.F.R. § 543.2: Definitions

The discussion draft's definition of an "agent" is problematic because it does not support the use of a computer application in performing the functions of an agent. As defined, only individuals can qualify as an agent. Such a narrow definition of an agent can be impracticable under certain circumstances where more than one agent is required to be present. Furthermore, by narrowly defining agent to include only persons, the discussion draft prevents tribes from taking advantage of technological advances that may perform the functions of an agent in a more cost-effective and efficient manner.

2. 25 C.F.R. § 543.7 & § 543.8: Bingo Games

The discussion draft's distinction between "gaming system" bingo and "manual" bingo is a significant departure from the well-accepted view and general consensus that "bingo is bingo." Bingo has historically been treated as one type of gaming activity by both the NIGC and tribal governments and while this proposed change may be the natural outgrowth of changes in technology for electronic Class II gaming we are concerned that this distinction may be interpreted as a "classification" distinction. We recommend the NIGC to review the draft regulation and refine its approach to streamline the MICS requirements for bingo games by merging the two sections together.

3. 25 C.F.R. § 543.12: Gaming Promotions

To the extent that promotions are non-gaming activities, we believe that TGRAs should be responsible for establishing and enforcing proper standards to govern promotional activities. We therefore ask the NIGC to distinguish between "gaming promotions" and "non-gaming promotions" and rely on guidance documents instead of the regulations in providing regulatory requirements for non-gaming promotion.

4. 25 C.F.R. § 543.17: Drop and Count

To eliminate confusion and ensure adequate coverage for all drop and count controls, we recommend streamlining the drop and count standards into one section instead of separating them by department or game type. By separating out the requirements for card games from player interface and financial instruments in the discussion draft, certain provisions have become misplaced so that the functions required no longer correspond with what is being controlled. For instance, § 543.17(f)(8) prohibits posting rejected

currency to a nonexistent interface, despite the fact that § 543.17 governs card games where interfaces are not used.

5. 25 C.F.R. § 543.18: Cage, Vault, Kiosk, Cash and Cash Equivalents

This section contains provisions for patron deposited funds and promotional payouts, drawings, and giveaway programs. To minimize confusion, these provisions should be covered in their respective sections instead of scattered throughout the regulation.

6. 25 C.F.R. § 543.23: Audit and Accounting

This section confuses the functions of independent accountants by requiring controls to ensure that each gaming operation “records journal entries prepared by the gaming operation and by its independent accountants.” Journal entries, however, are not generally recorded by independent accountants. We ask that the “and” in this provision be replaced with an “or” to better reflect industry practices.

Also, § 543.23(c)(8) refers to “instances of non-compliance cited by internal audit, the independent accountant, and/or the *Commission*” (emphasis added). The term “Commission” should be replaced with “TGRA.”

Further, it is important to note that the “Severability Clause” has been eliminated from both the MICS and the Technical Standards. This opens the possibility of having the entire set of Class II MICS overturned in the event that one of its provisions is held to be invalid, which we do not believe to be the intent of the NIGC.

CONCLUSION

The Wampanoag Tribe of Gay Head (Aquinnah) understands that the NIGC must balance the regulatory interests of the Agency with the need to provide flexibility for advancements in technology and needs of the gaming operation. We do not envy you this task, but we have confidence that you will weigh these concerns and develop regulations which will improve the current regulatory framework.

Respectfully,



Chairwoman Cheryl Andrews-Maltais
The Wampanoag Tribe of Gay Head (Aquinnah)