

# TUNICA-BILOXI GAMING COMMISSION



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RUDOLPH H. WAMBSGANS, III

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BOBBY PIERITE, SR.

October 27, 2004

RE: Comments on Class II Technical Standards Draft Regulation

The Honorable Philip N. Hogen  
National Indian Gaming Commission  
Chairman  
1441 L St., N.W.  
Suite 9100  
Washington D.C. 20005

Dear Chairman Hogen:

The Tunica-Biloxi Tribal Gaming Commission of Louisiana is writing to your Commission in support of the National Indian Gaming Association requests to call on the NIGC to engage in respectful and truly meaningful government-to-government consultation concerning the Class II Technical Standards Draft Regulation and to the substance of your proposed standards. Additionally, we ask that you withdraw your proposed standards until all government-to-government consultations are exhausted.

Up until recently, our Commission never regarded Class II gaming regulations with much interest and have primarily concentrated on class III gaming regulations. However, we have come to the realization that we must ensure that all regulations regarding Native American gaming are structured to the benefit of tribes for their economic health and well-being. Since our class III operation is a result of the agreement between the tribe and the State and all things being considered, we recognize that at the conclusion of the agreement we may only have an opportunity to conduct class II gaming.

We are concerned that the NIGC has over-stepped its boundaries by attempting to define from a legal standard class II from class III instead of the technical aspects related to the proposition. We respectfully ask you and your colleagues honor the request by the National Indian Gaming Association to meet with Native American leaders on November 16, 2004, in Washington D.C. and extend the time for comments on the Standards until November 29, 2004.

I have enclosed a copy of the specific concerns addressed by the Association and this Commission for your review and consideration for our upcoming meeting. Thank you for your time and efforts working with Native American tribes to preserve our unique relationship and we shall continue to look toward the future of our successful government-to-government relationship with your agency.

As always, we are at your service.

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NATIONAL INDIAN  
GAMING COMMISSION

October 27, 2004

Respectfully,



Rudolph Henry Wambsgans III  
Commissioner Chairman  
Tunica-Biloxi Tribal Gaming Commission

rhw

cc: TBTLA x 7  
TBTGC x 3  
National Indian Gaming Association  
224 Second Street SE  
Washington D.C. 20003  
File

**NIGA should Develop Technical Standards, Not Revisit Legal Standards:** While referred to as “technical standards,” much of the current rulemaking focuses on the legal aspects of Class II gaming. This proposed rulemaking calls into question ten years of case law won largely by the tribes, as well as the NIGC’s own pronouncements, and effectively redefines “bingo” and other Class II games. The latest draft would reclassify a number of games that the federal courts, tribal gaming commissions, and the NIGC itself have previously determined to be Class II. NIGC should reject this approach and refocus on technical standards for Class II technologic aids.

**NIGC Should Honor the IGRA’s Definition of Bingo.** In IGRA, Congress placed only three requirements on a game of bingo and the federal courts have held that these three requirements “constitute the sole legal requirements for a game to count as Class II bingo.”<sup>1</sup> NIGC’s proposal to impose more requirements on bingo games would chill technical advancements and micromanage both the business judgment and regulatory responsibilities of tribes. NIGC should use IGRA’s definition of bingo and reject arbitrary new requirements.

**Bingo Prizes.** IGRA specifies only that a game of bingo must be played for prizes. NIGC seeks to restrict both the amount and types of prizes that Tribes can offer. These are marketing decisions with tribal government discretion. Again, NIGC should respect IGRA’s statutory definition of bingo.

**Bingo Cards.** IGRA requires that bingo be played with cards, but NIGC seeks to regulate all aspects of a bingo card, including both its size and number of squares.

**Timing of Card Selection.** NIGC’s proposal asserts that a player must not be able to obtain a new card once game play begins or join a game in progress. Such restrictions find no support in IGRA or court decisions, and conflict with long-established games such as Bonanza Bingo.

**Auto Daub is An Accepted Part of Bingo.** IGRA expressly authorizes the use of technologic aids in the play of Class II games. Further, the courts have held that the manner in which a player covers their card(s) is irrelevant. The NIGC’s attempt to prohibit this advancement in technology is without legal support and disregards the fact that as Bingo is played in America, players commonly use an auto daub feature on electronic bingo minders.

**Bingo Ball Draw.** NIGC’s position that balls must be released to players “in close proximity” to the time at which they were generated, also lacks support under IGRA. Games such as Bonanza Bingo with so-called “pre-drawn balls,” predate IGRA and were not intended to be eliminated by its enactment.

**Multiple Ball Releases.** While the NIGC has said that a game of bingo cannot be won after only one release of balls, but now seek to extend this requirement to the interim portions of a game of bingo. This aspect of NIGC’s proposal violates the holdings and spirit of the MegaMania cases.

**Different Interim Patterns Within A Common Game.** Nothing prohibits a game where players competing for the same game-winning pattern also compete for different interim patterns. As the courts have held, the proper focus of a game classification analysis is whether the game “as a whole” meets the three statutory requirements of bingo- not each constituent part of the game. To do otherwise is to add a limitation upon the game not envisioned by Congress and again, diverges from the commonly accepted requirements for bingo as played in America.

**House Banking.** Unlike traditional house banked games such as blackjack, in bingo and games similar to bingo, the house is not a participant in the game. At no time does the house have its own card, nor does it take on or compete against the game’s players. NIGC should not put arbitrary restrictions concerning “house banking” upon the game of bingo or games similar to bingo. (Any reference to a court ruling on a particular state’s law must be rejected in analyzing IGRA.)

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<sup>1</sup> United States v. 103 Electronic Gaming Devices, 223 F.3d 1091, 1096, 1097 (9<sup>th</sup> Cir. 2000).

**Broadening Participation.** Contrary to the latest draft, technologic aids are not uniformly required to broaden participation but merely to facilitate the conduct of Class II games. Requirements calling for a minimum of either six players in each game or a two second delay between games should not be placed upon the game of bingo. The focus should be upon ensuring that a player does not play alone against a machine, a standard that is satisfied by requiring the participation of two or more players.

**Paper Pull-Tabs Are Not Required.** NIGC seeks to require "tangible," or paper, pull-tabs when the game of pull-tabs is played with electronic equipment. This presumption is not supported by either IGRA or recent court decisions.

**Focus on IGRA's Class II Technologic Aid Provisions, Not the Johnson Act.** NIGC's 2002 rulemaking, supported by the decisions of federal appeals courts, removed the Johnson Act from the analysis of Class II technologic aids under IGRA. Thus, an analysis of Class II technologic aids should begin with an inquiry as to whether the equipment is a technologic aid to a Class II game. If so, it should end there. NIGC should avoid any return to the notion that the Johnson Act should be included in a game classification analysis under IGRA.

**Due Process Concerns.** Under the current NIGC advisory opinion process, there is no clear avenue for an appeal to the NIGC to secure a final agency decision that a tribal government may appeal to federal court. NIGC's draft proposal continues this problem by providing no clear avenue for appeal of the full Commission.

**Bypasses Tribal Regulatory Agencies.** IGRA establishes tribal government regulatory agencies as the primary, day-to-day regulators of Indian gaming. Thus, tribal governments retain the authority to engage in Class II gaming pursuant to a tribal gaming ordinance approved by NIGC AND NIGC is empowered to monitor Class II gaming. In the first instance, tribal regulatory agencies should retain the authority to review any gaming laboratory decisions concerning Class II gaming subject to NIGC monitoring. NIGC's proposal effectively cuts our tribal gaming regulatory agencies out of the process.