TESTIMONY

OF

TOM GEDE

EXECUTIVE DIRECTOR, CONFERENCE OF WESTERN ATTORNEYS GENERAL (CWAG)

AT THE HEARING PANEL

OF THE NATIONAL INDIAN GAMING COMMISSION (NIGC)

CONCERNING

CLASS II GAMING DEFINITIONS AND CLASSIFICATION STANDARDS

September 19, 2006

Good morning, Mr. Chairman and Members of the Commission. My name is Tom Gede, and I am the Executive Director of the Conference of Western Attorneys General, or CWAG. CWAG is an association of Attorneys General of 18 Western States and Pacific Island territories. I am pleased to be here to provide some limited views on the proposed rules on definitions for electronic or electromechanical facsimile and classification standards for class II gaming activities played in an electronic format with computer, electronic or technologic aids. The Western Attorneys General may be filing comments by next week expressing their views on the proposed rules. My comments today reflect some preliminary perceptions before the filing of comments next week.

The efforts of the National Indian Gaming Commission (NIGC or Commission) to adjust the definition of "electronic or electromechanical facsimile" and to provide standards for the classification of class II gaming activities played in an electronic format with computer, electronic or technologic aids are particularly commendable. While, as discussed below, some modifications in the proposals might be appropriate, the Commission should be supported in its effort to make these important regulatory changes.

In this testimony, I limit myself to the proposals that were published in the Federal Register, namely the Proposed Rule on the Definition for Electronic or Electromechanical Facsimile, 71 Fed. Reg. 30232-30235 (May 25, 2006), and the Proposed Rule on Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using ‘‘Electronic, Computer, or Other Technologic Aids.” 71 Fed. Reg. 30238-30261 (May 25, 2006).

The areas that I will cover in this testimony include the following suggestions for modifications to the proposed rules, to be discussed in more detail below.

- First, the proposed definition of an “electronic or electromechanical facsimile” is an improvement from the 2002 definition, particularly in its addition of the word “fundamental” when describing the characteristics of a game that when incorporated into an electronic or electromechanical format would constitute a facsimile. However, the word “all” should be deleted in the proposed definition in subparagraph 502.8(b)(1) in describing those “fundamental characteristics,” as it is internally inconsistent and opens it to an argument that incorporating anything less than “all” of the fundamental characteristics makes the game a technologic aid and not a facsimile.
- Second, in the same proposed definition, in subparagraph 502.8(b)(2), the language “rather than broadening participation among competing players” should be deleted, so that the description of when bingo, lotto and other games similar to bingo are facsimiles should end where it states “[a]n element of the game’s format allows players to play with or against a machine.” Preferably, it should read “[a]n element of the game’s format allows players to play with or against a machine that applies an element of chance to win or lose the game.”
- Third, the class II classification regulations, where it provides for a process for approval, introduction and verification of technologic aids, should also provide a notification procedure to the State where the gaming is proposed to occur, and a process whereby the

State is allowed the opportunity to appeal a finding of the Commission that a device is a technologic aid.

- Fourth, while the proposed classification rule commendably clarifies in many ways how bingo, lotto and games similar to bingo may be played in order to be permissible, it allows something called bingo in an "ante-up" format in section 546.8(k). The Prologue to the proposed rule, however, suggests that the Commission believes bingo is to be played in its "classic form," and the States are unaware of the "ante-up" format as representing a classic form of bingo.

Preliminarily, let me note that the issues before the Commission are of great significance to the States. The ability to accurately distinguish between "technologic aids" and "electronic and electromechnical facsimiles" is important to the States, precisely because the latter devices, along with "slot machines of any kind," are by definition class III gaming activities, requiring a tribal-state compact for their lawful use on Indian lands. 25 U.S.C. §§ 27030(7)(B)(ii), 2703(8), 2710(d)(1)(C). The intent of Congress in the Indian Gaming Regulatory Act of 1988 (IGRA) was to engage the States in the process leading to the authorization of more serious forms of gambling that could occur on Indian lands. The Senate Committee Report accompanying S. 555 provides:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. S. Rep. No. 446, 100th Cong., 2d Sess. 13.

The Commission has now suggested a new definition of "electronic or electromechanical facsimile" of a game of chance, in proposed 25 C.F.R. §502.8, which would provide:

> (a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.
> (b) Bingo, lotto, and other games similar to bingo are facsimiles when:

> (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or
> (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.

The proposed rule appears to be an improvement over the definitional rule adopted by a 2-1 split Commission in 2002. 25 C.F.R. § 502.8 (67 Fed.Reg. 41172, June 17, 2002.) The original definitional rule adopted by the Commission in 1992 was, in the view of the States, the more accurate and faithful reflection of the law in IGRA, as I explain below.

IGRA provides that "class II gaming" does not include, among other things, "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(2). As Congress did not define "electronic or electromechanical facsimile," the Commission in 1992 looked to other provisions in IGRA in order to craft a definitional rule that accurately covered such devices and which could serve to allow a clean distinction between such a device and what is otherwise permitted in the play of class II gaming activities, namely, an "electronic, computer, or other technologic aid[]." 25 U.S.C. § 2703(7)(A)(i). As for an electronic gambling device that is a facsimile of a game of chance, Congress made it eminently clear that such devices would be those covered by the federal Johnson Act. 15 U.S.C. §§ 1171-1178, also referred to as the Gambling Devices Act. That Act defined slot machines, and also defined other gambling devices as those:

> designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property. 15 U.S.C. § 1171(a)(2).

Congress also expressly provided that the Johnson Act is waived when a covered device is the subject of a Tribal-State compact, i.e., as a class III gaming activity. IGRA provides:

> The provisions of section 1175 of title 15 [the Johnson Act] shall not apply to any gaming conducted under a Tribal-State compact that - (A) is entered into under [the relevant IGRA provision for compacting] by a State in which gambling devices are legal, and (B) is in effect. 25 U.S.C. 2710(d)(6).

Conversely, IGRA states a Tribe may engage in class II gaming only if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law," 25 U.S.C. § 2710(b)(1)(A), which clearly embraces the Johnson Act. Thus, the Johnson Act's gambling device prohibition applies to class II gaming activities and, as noted, the only exception in IGRA is provided by the text of the statute – gaming conducted under a valid Tribal-State compact – which, in turn, contemplates only class III gaming.

It is not surprising, then, that this was the logical construct applied by the Commission when it first adopted regulations defining terms in IGRA. In 1992, the Commission adopted definitional regulations that defined "technologic aid" as:

> a device such as a computer, telephone, cable, television, satellite or bingo blower and which when used: (1) [i]s not a game of chance but merely assists a player or the playing of a game; and (2) [i]s readily distinguishable from the playing of a game of chance on an electronic facsimile; and (3) [i]s operated according to applicable Federal communications law. 25 C.F.R. § 502.7 (1992).

Similarly, the NIGC, following the text and direction of the statute, defined "electronic or electromechanical facsimile of a game of chance" as "a device defined by [the Johnson Act]." 25 C.F.R. § 502.8 (1992). This definition, later abandoned by the NIGC in a split ruling, was upheld and used by the District of Columbia Circuit Court of Appeals in a rejection of a claim that a computerized pull-tab device constituted a technological aid, and thus, did not within the proscription of the Johnson Act. *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633 (D.C. Cir. 1994).

Notwithstanding the judicial upholding of the "bright-line" definition, the NIGC in 2002, in a 2-1 decision, adopted a new definitional rule for "electronic or electromechanical facsimile," providing instead:

> 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 (67 Fed.Reg. 41166, June 17, 2002).

As is apparent, the Commission dropped the reference to the Johnson Act and provided an "except" clause for games played in an electronic or electromechanical format as long as it broadens participation by allowing multiple players to play with or against each other rather than with or against a machine. The re-write was accomplished to allow a device, fitting within a newly-rewritten definition of "technologic aid," to not fall within the ambit of an "electronic or electromechanical facsimile." Several state Attorneys General wrote the Commission on July 23, 2001, during the comment period for the proposed re-write, objecting to the then-proposed modification, and once the final rule was issued in 2002, it was clear that, with minor exceptions, the final rule ignored the objections of the Attorneys General.

In adopting the 2002 rule, the Commission noted it expanded the definitions to reflect the notion that broadening participation is an important characteristic of a technologic aid, and carried this into the exception in the definition of a facsimile. 67 Fed.Reg. 41170-71. Even while acknowledging "broadening participation" is not a required element, the Commission, by dropping the Johnson Act reference for a facsimile, heightened the importance of the "broadening participation" element. It rested that element on the notion that IGRA specifically provides for an electronic draw in bingo games, and that greater freedom with regard to class II gaming was intended by the Congress. *Ibid*. The Commission thus concluded in its prologue that the definition "electronic or electromechanical facsimile" should be more narrowly construed.

The Commission went further, and without citing any applicable text of the statute, stated that "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." 67 Fed.Reg. 41171. This statement fails to account for a meaningful distinction between class II games and class II games played electronically.

The current proposal appears to correct some deficiencies in the 2002 definition for an "electronic or electromechanical facsimile," in part, by adding the word "fundamental" in requiring that a facsimile replicate a game of chance by incorporating the fundamental characteristics of the game. It also "reverses" the exception in the 2002 definition, so that instead of "excepting" out bingo and games-similar-to-bingo played in an electronic format so long as they broaden participation among players, the proposed rule now provides an affirmative that bingo and bingo related games ***are*** facsimiles if an element of the game's format allows players to play with or against a machine, rather than broadening participation among players.

The proposed revision improves the definition, even if still flawed by relying on the notion of "broadening participation." The language "rather than broadening participation among competing players" should be deleted.

The 2002 effort by the Commission to rest "electronic or electromechanical facsimile" on the notion of "broadening participation" among competing players, as discussed above, was not and is not sound. While the Senate Report accompanying the bill that became IGRA, S. 555, referred to permitting technology that would broaden potential participation levels in class II games, it carefully qualified the matter. The Committee said:

> 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 the 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.... 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. 446, 100th Cong., 2d Sess. 10 (1988) (emphasis added).

Although the Commission in 2002 picked up this language of "broadening" participation, it also eliminated in its then-new definition of "technologic aid" the (judicially upheld) requirement that such equipment be "readily distinguishable" from an "electronic or electromechanical facsimile," stating it was an unworkable test. Again, by eliminating the "readily distinguishable" test and any reliance on the Johnson Act, the 2002 NIGC action heightened the importance of "broadening participation." Many have simply jumped on the "broadening" notion to suggest that computerized gambling devices offering class II games are acceptable if they are to be played by multiple players. However, the Senate Committee's discussion of broadening participation with multiple players is importantly qualified by its language that it be "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine . . ."

Nothing suggests, however, that a Johnson Act gambling device is acceptable for class II gaming simply if multiple players are engaged.[1] Most class II games pit multiple players against

[1] Whether the Johnson Act exempts class II "technological aids" has become the subject of conflicting decisions in the federal circuit courts, and the Supreme Court has not resolved the issue. Most recently, in *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (2003), the Eighth Circuit held that IGRA does not provide an implied exemption from the Johnson Act for gambling devices used as purported technologic aids to class II gaming. *Id*., at 611-612. The court held that the statute's reference to "not otherwise prohibited by Federal law" refers to the Johnson Act and that in order for a device to be used by a Tribe in Indian country in the *absence* of a tribal-state compact, the device both must not be a "gambling device" under the Johnson Act and must be a "technologic aid" under IGRA.

each other in any case; even in pull-tabs, where an individual singly purchases a pull-tab, the pull-tabs have a pre-determined winner that will appear to one of multiple purchasers. Broadening a game to multiple players might establish that a game is class II, not whether it acceptable when played on a computer or electronic device. Even the Tenth Circuit in *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission* rejected the Commission' suggestion to graft a "broaden participation" requirement onto IGRA. The court noted:

> … nothing in either IGRA's text or legislative history points towards a requirement that a technologic aid broaden participation. Indeed, the Committee Report uses the term "for example" to describe how a device might qualify as a Class II aid by broadening participation in the given game. 327 F.3d 1019, 1041 (10th Cir. 2003).

Here, the more critical distinction rests on whether a player of a class II game is playing "with or against a machine" that, significantly, applies "an element of chance" to win or lose. Thus, the Commission should drop the phrase in § 502.8(b)(2) "rather than broadening participation among competing players," and complete the sentence at "with or against a machine," or, in order to restore the meaning of the Johnson Act, the following phrase: "with or against a machine that applies an element of chance to win or lose the game."

Additionally, the Commission should eliminate the word "all" in § 502.8(b)(1), describing what fundamental characteristics of a game must be incorporated to make the game an electronic or electromechanical facsimile. First, subparagraph (a) of the proposed rule does not use the word "all." The proposed rule adds the word "fundamental" to "characteristics" and this is adequate.

The appearance of the word "all" in one subparagraph and not in the other will lead to confusion and contention over the scope of what characteristics must be incorporated to make a device a facsimile. Significantly, it should be eliminated because it opens the rule to the argument that a game that incorporates anything less than "all" of the fundamental characteristics of a game does not meet the definition of "electronic or electromechanical facsimile," and that it

is merely a "technologic aid." Anything that is not an "exact" replica of a class II game will be offered as a permissible class II game in electronic or electromechanical format that clearly may be in violation of the Johnson Act and IGRA.

> As the Attorneys General offered in their July 23, 2001 letter to the Commission:
>
> The danger, and in our estimation, the mistake to be made in repealing 25 C.F.R. 502.8, was recognized by the D.C. Circuit years ago in Lion Mfg. Corp. v. Kennedy, 330 F.2d 833, 837 (D.C. Cir. 1964), addressing the 1962 amendments to the Johnson Act: "This section . . . address[es] only those machines which, although differing from the slot machine in physical design, are calculated to function quite as effectively in separating the public from its money on a large scale. [The section] appears to have proceeded from a conscious purpose on the part of Congress to anticipate the ingeniousness of gambling machine designers."

The Commission similarly should guard against the "ingeniousness of gambling machine designers" and avoid using language in the rule that would provide room to permit a gambling device that properly should be the subject of a Tribal-State compact. The word "all" should be deleted from § 502.8(b)(1).

The Commission has also prepared an extensive proposed rule on standards to apply to class II games, such as bingo and games similar to bingo, lotto, pull-tabs and instant bingo, when played through an electronic medium using "electronic, computer, or other technologic aids." 71 Fed. Reg. 30238-30261 (May 25, 2006).

These standards are commendable and I believe they will serve an especially useful purpose, allowing the Commission to more readily distinguish what games are properly class II and class III gaming activities. The States' are not principally concerned here with the rules of bingo, lotto, games similar to bingo, pull-tabs and other class II games, but are concerned when such games are played in an electronic format. When class II games are played using electronic or electromechanical devices, and either the game replicates the fundamental characteristics of

the class II game or it is a type of slot machine, then the game is class III and requires a Tribal-State compact.

The Commission correctly observes that when bingo and games similar to bingo are played in an electronic format "it becomes easy to use features such as the instantaneous, rather than serial, release of numbers and the automatic covering (daubing) of those numbers on a player's electronic card as a pretext to fundamentally change or distort the nature of the game such that it becomes an 'electronic facsimile' of the game." 71 Fed.Reg. 30241 (Prologue). When the nature of the game is so converted, the states have a keen interest in the Commission enforcing workable standards to ensure uncompacted class III gaming is not occurring.

Of particular importance in this regard is the Commission's insistence on the independence of the bingo cards from the numbers or other designations are randomly drawn or electronically determined. § 546.4. The application of the element of chance in the random draw of number or designations in any bingo game or in a game similar to bingo must be independent from the assignment of cards and the designations on those cards. The Commission correctly requires that the numbers or other designations used in the game must be drawn or determined electronically from a non-replaceable pool of such numbers that is greater than the number of spaces on the card used in the game.

The Commission's focus on "real time" responses to the draw of numbers without "pre-drawn" numbers being used, and the requirement that players should have to "cover" their numbers "when" the numbers are drawn, rather than the use of an "auto-daub" procedure, are especially useful. § 546.5. Allowing the game to "unfold" automatically can be sped up to super-slot-machine speeds, and effectively mimic a slot machine. The requirement of not more than ½ of a video screen being dedicated to an alternative display is particularly important. Additionally, the States find it useful that the Commission require a minimum number of persons

to play these games, § 546.6, as well as the means to encourage play with six (6) or more players, including a time delay to facilitate more players engaged in play.

I am not prepared to suggest any flaw with the Commission's proposal on progressive prizes, as long as those prizes are not based on the application of an element of chance independent from the bingo draws. § 546.4(n). However, any game that permits pooling and/or awards of prize money subject to an additional chance element, independent of the game's releases, may constitute a traditional lottery or other form of a class III gaming activity that requires a Tribal-State compact. Technically, a "progressive prize," as defined by this rule, may be a form of a traditional lottery. However, it may be acceptable if it is part of the "traditional" game of bingo and the proposed rule requires that it be awarded solely within the win of one bingo game to the next, and not based on events outside the random selection of numbers in the game.

I would express concern, however, that in attempting to hew to what is the "classic" form of bingo, 71 Fed.Reg. 30243 (Prologue), the Commission's rule focuses more on the appearance of the classic bingo card for bingo (but not for "games similar to bingo"), and less on how non-traditional prizes are awarded. Multipliers, bonuses and progressives should be examined by the Commission to see if the prize structure converts a game into a traditional lottery that should be considered a class III gaming activity subject to a Tribal-State compact. It is commendable that the Commission require any such award be based on an event directly related to the relevant bingo draws and not on an event unrelated to bingo play, such as eligibility to spin a wheel or similar extra play. Congress did not intend to grandfather as class II gaming activity every form of a traditional lottery, and indeed most lotteries of the sort run by States would qualify as class III gaming. Careful attention to the structuring of prize awards is warranted by the Commission, to ensure that bingo and bingo-related games are not converted into traditional class III lotteries.

I would note that some States have expressed concern that the Commission, in this proposed rule, permits something called "bingo" in an "ante-up" format. While such a game appears to mimic a marriage of poker and bingo, it does not appear to the States to be a traditional form of bingo, or "classic" bingo. Arguably it is similar to bingo, but it is similar to poker as well, and causes one to wonder is it really what Congress had in mind.

The States will undoubtedly strongly support the Commission's proposed rule to require that every pull-tab card or instant bingo ticket be in a tangible medium, such as paper or plastic, and readily accessible to the player. §§ 546.7, 546.8. Important to this proposed rule is that no display option should determine a winner, a prize or change the result of the pull-tab, nor can a pull-tab or instant bingo ticket be generated, printed, redeemed or paid out at the player station. The relevant case law is still controlling and relevant as expressed by the courts in *Cabazon Band v. NIGC*, 827 F. Supp. 26 (D.D.C. 1993), aff'd 14 F.3d. 633 (D.C. Cir. 1994); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994) (Cabazon II); and *Sycuan Band v. Roache*, 54 F.3d 535 (9th Cir. 1995), as discussed in the Prologue to the proposed rule. Critical to this is that the definition include, as is proposed: "[e]ach deal contains a finite number of pull-tab cards that includes a pre-determined number of winning cards." § 546.3(f). It may be important for the Commission consider how to ensure that the game of pull-tabs is fair to the players, i.e., that the decks are in fact finite, that players are playing all the way through a deck, that decks are not being stopped short or being substituted one deck for another to manipulate odds unfairly against players.

Finally, with respect to the classification rule, the States will call for a notification procedure to the States in the process for approval, introduction and verification of technologic aids. § 546.9. Such a process can provide for means to protect trade secrets, and commercial and financial information that is privileged and confidential. Still, a description of the working of the "technological aid" that is proposed for certification should be provided to the State or States where the gaming device is to be used, upon the regular submission to the Commission.

The applicant should be able to provide enough details to allow a State to make its own determination of whether the device is a "technological aid," a "facsimile" or a slot machine. Additionally, the State should be allowed the opportunity to appeal a finding of the Commission that a device is a technologic aid. Again, the interests of the States are heightened when devices are proposed that may in fact be facsimiles or slot machines, and the States should be able to participate in the process.

If the Commission has additional questions or needs additional information from the Attorneys General, please do not hesitate to contact me. I join the state Attorneys General in thanking the Commission and its staff for its hard work in preparing these proposed rules. They reflect much hard work, analysis and thoughtfulness.

# # #