

Stand Up For California!

“Citizens making a difference”

standupca.org

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October 2, 2006

Honorable Phil Hogen Chairman
National Indian Gaming Commission
1441 L Street N. W.
Washington D. C. 20005
Fax: 202 632-7066

RE: Proposed Rulemaking – Class II Gaming Definition and Classification Standards

Dear Chairman Hogen:

Stand Up For California wishes to submit comment for the record on the newly proposed rules for Class II Gaming Definitions and Classification Standards. We commend the National Indian Gaming Commission (NIGC) efforts for its hard work in researching this issue and attempting to develop language consistent with the intent of the Indian Gaming Regulatory Act (IGRA) and the Johnson Act (JA). These comments reflect in plain language the unintended consequences occurring in California as the expanded use of Class II devices threatens the integrity of the compacts.

Stand Up For California supports the language recommendations in the recent testimony of Tom Gede – Executive Director of the Conference of Western States Attorneys General. The language recommendations address the unintended consequences that have been created by the indistinct line in defining Class II machines.

Clarification in the regulations is essential in order preserve the delicate balance of IGRA between Tribes, States and the Federal government. Without clarification states like California may look elsewhere to expand gaming opportunities, likely being the approval of competing forms of gaming (e.g.VLTs in race tracks and card clubs) which can be taxed. Indeed, since the enactment of IGRA, twenty-seven states have authorized full service casino-style gaming in an attempt to foster competition to control the expansion of tribal gaming.

Discussion

The emergence of Class II games that look, feel and play like conventional slots requires federal officials to tighten and clarify the legal definition of the bingo based devices. Stand Up For California seeks regulatory reforms which provide a uniform federal policy.

- (1) A clear definition of Class II technological aids,
- (2) A determination that an electronic or electromechanical facsimile is a Class III game,
- (3) A process of consultation, comment and appeal to resolve conflicting determinations of Class II games which individual states identify as illegal.
- (4) Concern over the Influence of Gaming Manufacturers

Clear Definition of Class II technological Aids:

In 1991 the NIGC adopted a definition of a Class II technologic aid as:

A device such as a computer, telephone, cable, television satellite or bingo blower and which when used: (1) is not a game of chance but merely assists a player or the playing of a game; and (2) is readily distinguishable from the playing of a game of chance on an electronic facsimile; and (3) is operated according to applicable Federal communications law.

This is a good definition. Each of these components standing alone represents a technological aid. Such as, the bingo blower assists in picking out the ball with the number, or the computer or television screen to display the number assisting the player by visually displaying the numbers. The cable, telephone or television satellite which connect several games increasing¹ the number of players and the pot. However, it is easy to see how ingenious gaming manufactures have taken technological aids, combined them and promoted a theory of playing against multiple players debatably construing that the devices are a Class II machine.

California offers a technological aid to the State Lottery, a Lottery dispensing machine. The machine dispenses a lottery ticket when dollar(s) are inserted. The device always delivers a lottery ticket. The ticket may have different lottery numbers, but it is always a lottery ticket. The operator of the device experiences no “element of chance” as the compensation is a lottery ticket for the consideration. The device does not look like a slot machine. It is a Lottery dispensing device readily distinguishable from a slot machine.

A determination that an electronic or electromechanical facsimile - is a Class III game:

Stand Up For California suggests clarifying the language of 502.8 (a) and (b) (1) to include, “any, some or all of the fundamental components of a game”. Please give our suggested changes in bold italics below your kind consideration.

¹ “...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” – Senate Committee Report on IGRA page 9.

Sec. 502.8 Electronic or electromechanical facsimile.

(a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating any, some or all ~~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 any, some or 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.

Expanded Class II definitions or a definition that leaves wiggle-room for ambiguity has the potential to make the tribal state compact process unnecessary and states virtually powerless to regulate the growth of Indian casinos. Congress in its wisdom included in the purposes of IGRA the required development of a regulatory structure adequate to “shield (tribal gaming) from organized crime and other corrupting influences...and to assure that gaming is conducted fairly and honestly by both the operator and players.” 25 USC 2702 (2) Wiggle-room in the definition provides opportunities for ever-clever gaming manufactures to promote gaming devices that should be under the authority of a tribal state compact.

The definition of an electronic or electromechanical facsimile must include a device that plays any game which incorporates **any, some or all of the “fundamental components of a game”**, whether it is bingo or lotto. An electronic or electromechanical facsimile is any game replicated and played in the form of a device which operates with an **“element of chance”**. Such a determination is consistent with both the Johnson Act and IGRA. The goal of a new casino game classification is to promote a uniform federal standard.

The current Class II Bingo machines have been made to look like a slot machine. This is an intentional manufacture marketing scheme contrived to enhance marketability of the machines to both operators and consumers. Players using the IGT machines can press the play button and the daub button and view only the spinning reels instead of looking at the bingo card screen. The current Class II criteria of appearance of the game and how fast it plays are both subjective and vague. Here are two examples:

State of California - Machines identified as Class II machines by Tribes in operation in California are currently considered slot machines under California law. In a letter dated November 16, 2005, authored by California State Attorney General Lockyer, referring to the IGT machines in operation at the tribal casino in San Pablo:

“We believe that the machines meet the definition of a slot machine under California law. (Pen: Code section 330b, subd. (d)). The attributes that define a slot machine pursuant to this section have been identified in appellate decisions as well as Attorney General opinions. For example, Juke boxes and telephone card vending machines have been held to be “slot machines” where though they dispensed songs and telephone cards in return

for the money deposited, the devices also contained a jackpot or sweepstakes feature that, based solely on chance, awarded something of value in addition to the song or the phone telephone card.”

The role of multiple players has been construed to something it is not; somehow inferring that the operator of the machine is not playing against a machine. The reality is the player and the machines are playing. All other players are playing their individual machines participating in that element of chance with the machine. The multiple players may share in contributing to the size of the pot, but each player is still paying a consideration for an element of chance at that shared pot by playing against a machine. It is best to remove the line, “rather than broadening participation among competing players” from the regulation.

The line has the potential of creating ambiguity, multi players could be construed to include multi station playing.

State of Alabama - The gaming manufacturer Multi Media attacked the State statues of Alabama related to Sweepstakes. The State was chosen due to its vague lottery laws.

The manufacturer is selling internet time on computers with a plastic card. The card is ostensibly used as a key to start the computer for a period of time. But instead the computers are being used as a ‘reader’ to see if the purchaser of the internet time has won the Sweepstakes. The computers are not being used to ‘expand computer literacy’ as the CEO of Multi Media alludes, but rather to enhance the pari-mutuel racing experience at the Birmingham Race Course.

This new game makes clear how subjective and vague the criteria are. The plastic cards are sold at the rate of \$1.00 for four minutes of internet time that provide one hundred entries or chances in the Sweepstake. Winning and losing is already predetermined. Is this an internet service or a gambling scheme? Is this an illegal Class III lottery as determined by the State of Alabama or a Class II game? *The Jefferson County Racing Association v. Mike Hale and Innovative Sweepstakes Systems, Inc.* CV200507684

A Process of Consultation, Comment and Appeal:

Clearly the authorization of Class II machines without state oversight is beyond the intent of Congress in the passage of IGRA. NIGC would be well served to include a consultation and evaluation process with affected states for the certification of Class II games before final determinations are made. Most importantly, an appeal process must be established so that future potential disputes may be resolved without long and protracted adversarial litigation.

Federal regulators working with states will benefit by sharing in the resources and expertise of states in the certification process. Tribes will benefit by eliminating unwanted controversy and identifying the need to seek other remedies outlined in IGRA.

Concern over the Influence of Gaming Manufacturers

Gaming Manufacturers are asserting influence over Tribal clients to affect this regulation.² Since 2003 the various manufactures entered this market appealing to Tribal authorities by providing an opportunity to avoid the tribal state compact process and the need to re-negotiate compacts that limit the number of machines a Tribe can operate. In a letter dated - November 16, 2004, by Peter Siggins, Legal Affairs Secretary to Mr. Clifton Lind – DEO, President, Director of Multi Media Games, Inc.:

“It is our view that Multimedia Games, Inc. as a licensed gaming resource supplier has an obligation to cooperate with the State in securing the removal of these VLTs from the casinos operated by Pechanga and Morongo in order to assure that it is not **abetting a violation of state and federal law.**”

Gaming manufacturers benefit the bottom line of their industry if Tribes are discouraged from re-negotiating compacts even when Class III gaming is available and states are willing to expand gaming. Such a strategy opens up an unlimited market for Class II manufactures. While manufacturers benefit Tribes lose out on the significant benefit of a compact. Moreover, states are denied the right to manage the growth of the gaming industry assured to states through the tribal state compact process. The compact process provides significant protections to the welfare of the public and a long-term stable relationship between sovereigns.

- **IGT** and its Indian gaming subsidiary Sodak the largest manufacture of slot machines in the world have entered the market. The machines can be operated without looking at the bingo card.
- **Multimedia Games, Inc.** (Nasdaq symbol “MGAM”) the first company to develop a “bingo” game that looks and plays similar to a slot machines, called “Reel Time Bingo” (RTB”). In the upper left hand corner of the screen there is a small bingo card. Supposedly, when the player pushes the play button, he purchases an electronic card, and there is an electronic ball draw. Whether the player has a winner depends on whether a winning pattern is formed on the card. MGAM has licensed games from such slot machine manufactures as Bally and Williams. Thus, the games look virtually identical to the slot machines in Las Vegas.
- **Sodak** has unlimited resources to improve on what MGAM has accomplished with its RTB game, and to lobby the NIGC to permit Sodak’s game to play faster than the RTB game.

IGRA permits all Indian Tribes to conduct Class II gaming on Indian land. However, IGRA provides the Class III gaming may only be conducted with the express consent of the state (via a compact). **Many of the current gaming devices in use are electronic facsimiles, machines that “replicate” a game.** These machines meet the definition of slot machines in the federal Johnson Act and are prohibited under both California State Statute and Constitutional

² *Tornado Warning for Class II Gaming*, by D. Michael McBride III – Sneed, Lang P. C. and *Playing with the Rules – Class II Reduced* by Judith Shapiro. Shapiro Law. Both, July 2006 (has represented IGT)

gaming law. While imitating a bingo game and playing against multiple players, they offer the operator an element of chance to win money or property.

Conclusion:

Tribal critics have stated that the new rules represent a new-age termination. This is an overblown statement. IGRA provides a process for remedies to Tribes in situations where a state fails to negotiate in *good faith* as California has allowed by waiving its Eleventh Amendment.

Stand Up For California seeks reform of regulatory rules vital to California and other affected states. Developing sound policy over 'casino game classification' is important if individual states are to retain their rights in determining the intensity, form and scope over the more serious forms of gaming that their states will permit. Casino game classification enhances the supporting regulatory structure serving to ensuring the integrity of the Tribal gaming industry. Stand Up For California supports a uniform federal policy that meets the Johnson Act definitions and fulfills the intent of IGRA preserving the delicate balance of authorities between states, Tribes and the federal government.

Again, thank you for your continued efforts for clarification and the development of a bright-line in determining the definitions of Class II Gaming Definitions and Classification Standards. Please accept my thanks in advance for your kind consideration of Stand Up For California's comments.

Sincerely,

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